(22,353)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 732.

McLAUGHLIN BROS., A COPARTNERSHIP (JOHN R. McLAUGHLIN AND JAMES B. McLAUGHLIN, SOLE MEMBERS OF THE COPARTNERSHIP), PLAINTIFFS IN ERROR,

vs.

L. A. HALLOWELL ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

INDEX.

	Original.	Print
Caption	1	1
Appellants' abstract of record	1	1
Petition	2	1
Exhibit A—(Exhibit 2 of evidence)—Guarantee of stallion "Gambette V"	7	4
B—(Exhibit 6 of evidence)—Guarantee of stallion "Chantilly"	7	5
C—(Exhibit 1 of evidence)—Guarantee of stallion "Rotignon"	8	5
Attachment bond filed	8	5
Writ of attachment issued and returned	8	5
Petition for removal	9	6
Bond for removal	10	7
Order remanding cause	12	8
Motion for substitution, &c	13	8
Application for substitution of parties	14	9
Petition for removal	15	9

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	Original.	Print
Bond for removal	16	10
Objections to motion for substitution	17	11
Objections to petition for removal	19	12
Order denying petition for removal, &c	20	13
First amendment to petition	21	14
Second amendment to petition	30	19
Third amendment to petition	30	19
Fourth amendment to petition	31	19
Plea to jurisdiction and answer	31	20
Answer to third amendment to petition	35	22
Answer to amendments to petition	37	23
Plaintiffs' evidence	37	23
Testimony of Sylvester Barron.....(omitted in printing)..	37	—
Frank Rice.....(" " ")..	45	—
Lars Larson.....(" " ")..	46	—
L. A. Hallowell.....(" " ")..	48	—
N. L. Norton.....(" " ")..	62	—
S. W. McKinney....(" " ")..	65	—
J. T. Chambers.....(" " ")..	69	—
F. W. Rice.....(" " ")..	74	—
John L. Tweddale...(" " ")..	75	—
N. P. Barron.....(" " ")..	75	—
Exhibit D—Assignment, McKinney to Hallowell (omitted in printing)	76	—
Exhibits E, F, G—Assignments (not set out) (omitted in in printing)	77	—
Exhibit H—Agreement of sale.....(omitted in printing) .	77	—
Testimony of L. A. Hallowell (recalled) (omitted in printing)	78	—
Plaintiffs rest.....(omitted in printing)..	79	—
Motion to direct verdict for defendants..(omitted in printing)..	79	—
Defendants' evidence.....(" " ")..	80	—
Testimony of T. D. McLaughlin ...(" " ")..	80	—
Exhibit One-E—Letter, Fonda Horse Co. to McLaughlin Bros., January 24, 1903 (omitted in printing)	80	—
One-D—Letter to Barron, January 26, 1903 (omitted in printing)	81	—
5—Letter, Hallowell to McLaughlin Bros., 4-7-1903.....(omitted in printing)..	82	—
10—Letter to Hallowell, August 1, 1903 (omitted in printing)	83	—
1-F—Letter of Davis to McLaughlin Bros., October 12, 1903...(omitted in printing)..	92	—
Testimony of Mrs. Gethel G. Dunn (omitted in printing)..	93	—
W. R. Shea.....(" " ")..	96	—
T. D. McLaughlin (recalled) (omitted in printing)	101	—
Exhibit 1-B—Letter, Fonda Horse Co. to McLaughlin Bros., February 25, 1903..(omitted in printing)..	102	—
1-A—Testimony of L. A. Hallowell (omitted in printing)	102	—
Docket entries, &c	105	23

	Original.	Print
Plaintiffs' rebuttal.....(omitted in printing)..	107	—
Testimony of L. A. Hallowell..... (" " ")..	107	—
Evidence closed.....(" " ")..	110	—
Motion to strike testimony.....(" " ")..	110	—
Motion to direct verdict for defendants.....	112	25
Instructions given.....	113	25
Verdict.....	123	31
Motion for new trial.....	124	32
Judgment entered.....	124	33
Notice of appeal, &c.....	125	33
Index.....(omitted in printing)..	126	—
Appellants' amendment to abstract.....	128	34
Appellees' amendment to the appellants' abstract of record (part omitted in printing).....	130	35
Index.....(omitted in printing)..	164	—
Appellees' second amendment to abstract.....	165	38
Opinion *per curiam*.....	171	41
Judgment.....	173	43
Writ of error.....	174	43
Citation and service.....	177	44
Clerk's certificate.....	178	45
Designation by plaintiffs in error of parts of record to be printed and assignment of errors.....	179	46

1 In the Supreme Court of Iowa, September Term, 1908.

At Law.

L. A. HALLOWELL, N. BARRON, A. MOULTON (CORA B. MOULTON, as Administratrix of the Estate of A. Moulton, Deceased, Substituted for A. Moulton), S. Barron, N. Norton and Lars Larson, Appellees,

vs.

McLAUGHLIN BROS., a Co-partnership (JOHN R. McLAUGHLIN and James B. McLaughlin, Sole Members of the Co-partnership), Appellants.

Appeal from Pocahontas District Court.

Hon. D. F. Coyle, Judge.

E. A. and W. H. Morling and Wm. Hazlett, Attorneys for Appellants.

Kelleher & O'Connor and Frank Fairburn, Attorneys for Appellees.

Appellants' Abstract of Record.

Due and legal service of the within abstract of record accepted this — day of June A. D., 1908.

——— ———,

——— ———,

Attorneys for Appellees.

2 On the 16th day of December, A. D. 1903 the above named appellees (except Cora B. Moulton) filed in the office of the Clerk of the District Court in and for Pocahontas County, Iowa, their

Petition

entitled as the above named appellees (except Cora B. Moulton,) "plaintiffs vs. McLaughlin Bros. a co-partnership, defendants" as follows:

Division One.

That defendant is a non-resident of the State of Iowa, that it is a partnership, with headquarters at Columbus, Ohio, with a branch office at Emmetsburg, Iowa, conducting a business of importing and selling Percheron and French Coach Stallions; that on or about the first day of April, 1902, defendants sold to plaintiffs by written contract, a copy of which is hereto attached, marked Ex. A., and made a part of this petition, a certain stallion named "Gambetta V." for which plaintiffs agreed to pay $3000.00 in accordance with the terms

of the said contract hereto attached; that the said horse was delivered to the plaintiffs and after keeping him about ten days, plaintiffs learned that the said horse had previously been proved unsure and unable to get producing mares with foal, and upon learning said facts, and on or about the 16th day of April, 1902, the said plaintiffs returned to the said defendants at Emmetsburg, Iowa, the said stallion and received in exchange another stallion named "Chantilly," at which time defendant handed to plaintiffs a written memorandum or guarantee, a copy of which is hereto attached marked Ex. B. and made a part of this petition; that plaintiffs brought the said stallion to Fonda, Iowa, where they stood him during the stud season
3 of 1902, and during the said season bred 34 mares of which only 7 were got with foal. Finding the said stallion unsure and unable to get producing mares with foal, plaintiffs thereupon, to-wit, on or about the 25th day of February, 1903, shipped him to the defendants and received in return another stallion named "Rotignon" at which time defendant handed to plaintiffs a written memorandum or guarantee, a copy of which is hereto attached, marked Ex. C. and made a part of this petition. That plaintiffs at once brought this stallion to Fonda, Iowa, and handled him during the stud season of 1903; * that the said horses and each of them were purchased by these plaintiffs upon the written guarantee hereto attached, (Exs. A. B. and C) that each of them would get 60 per cent of the producing mares with foal, with proper care and handling; that said plaintiffs relied upon said guarantee and representation and bought the said horses and each of them relying on the same; that in truth and in fact not one of the said horses were and not one of them would or could get 60 per cent of the producing mares in foal; that plaintiffs have given them and each of them proper care and have handled them as such horses should be handled and have made every effort possible to get the said horses and each of them to live up to the contracts under which they were bought, and they have wholly failed, and the horses have been and are wholly worthless for the purpose for which they were bought and for any purpose whatever, and plaintiffs have repeatedly demanded of defendants that they make their said contracts good, and to furnish a horse that would get colts as agreed, but defendants have failed and refused to do so. They further alleged that the said written guarantees have been breached in that the horses and each of them and particularly the horse Rotignon have not got 60 per cent of the producing mares with foal, under the conditions named, and that the said sale was made through
4 fraud, misrepresentations and deception upon the part of this defendant, and plaintiffs are damaged in the sum of $3000.00.

Division Two.

(Same as Division One above *)

That these horses and each of them were purchased by these plaintiffs for the purpose and only for the purpose of using them for breeding purposes and it was well known to these defendants that the said horses and each of them were purchased for that purpose; that

the said horses and each of them have had good care while in the possession of these plaintiffs and they have been stood as other stallions have been stood and have utterly failed to prove sure foal getters and to serve the purpose for which they were bought; that the defendants well knew that they were bought for producing purposes and well knew at the time of sale that they were wholly unfit for said purpose; that by reason of which facts the said defendants have breached the warranty that the said horses and each of them were reasonably suitable for the purpose for which they were intended and plaintiffs have been thereby damaged to the extent of $3000.00.

Division Three.

(Same as Division One above *)

That the said horses and each of them were purchased by these plaintiffs on the written guarantee hereto attached (Exs. A. B. and C.) that each of them would get 60 per cent of the producing mares in foal, with proper care and handling, that plaintiff relied upon said written guarantee and representation and bought the said horses and each of them relying on the same; that in truth and in fact not one of the said horses were sure and not one of them would or could get 60 per cent of the producing mares in foal; that plaintiffs have given them and each of them proper care and handled them as such horses should be handled and have made every effort possible to get the said horses and each of them to live up to the contracts under which they were bought, and they have wholly failed, and the horses have been and are wholly worthless for the purpose for which they were bought and for any purpose whatever, and defendants knew at the time of said sales the purpose for which these horses were intended, and plaintiffs have repeatedly demanded of defendants that they make their contracts good and that they would furnish a horse that would be sure and live up to the guarantees, both express and implied, but defendants have failed and refused to do so; that the consideration for the said contracts and each of them has wholly failed, whereby plaintiffs have been damaged in the amount of $3000.

Division Four.

That defendant is a non-resident of the State of Iowa, that it is a partnership with headquarters at Columbus, Ohio, with a branch office at Emmetsburg, Iowa, conducting a business of importing and selling Percheron and French Coach Stallions; that on or about the 25th day of February, 1903, defendants sold to plaintiffs by written contract, a copy of which is hereto attached, marked Exhibit C, and made a part of this petition, a certain stallion named Rotignon, for which plaintiffs agreed to pay $3000, in accordance with the terms of the said contract hereto attached; that the said horse was delivered to the said plaintiffs and was shipped at once to Fonda, Iowa, where he was stood thru the stud season of 1903, that the said horse was purchased by these plaintiffs upon the written guarantee hereto attached (Ex. C.) that he would get 60 per cent of the

producing mares with foal, with proper care and handling; that plaintiffs relied upon said written guarantee and representation and bought the said horse relying on the same; that in truth and
6 in fact the said horse was not and is not sure, and did not get 60 per cent of the producing mares in foal, the plaintiffs have given the said horse proper care and have handled him as he should have been handled, yet the horse has failed to live up to the contract under which he was bought, and the horse is and has been wholly worthless for the purpose for which he was intended and for any purpose whatever, and plaintiffs allege that defendants knew at the time of the said sale the purpose for which this horse was intended, and plaintiffs have repeatedly demanded of the defendants that they make said contract good, and that they live up to the warranties of said contract, both express and implied, but defendants have failed and refused to do so; that the consideration for said contract has thereby wholly failed, whereby plaintiffs ask judgment against defendants to the extent of $3000.

Wherefore plaintiffs ask judgment against defendants for $3000, with interest and costs, and ask for a writ of attachment to the amount of $1500.

(Signed) ARTHUR W. DAVIS,
HEALY BROS. & KELLEHER,
Attorneys for Plaintiff.

STATE OF IOWA,
Pocahontas County, ss:

I, L. A. Hallowell, being first duly sworn, depose and say that I am one of the plaintiffs in the above entitled cause, and that the statements and allegations contained therein, which I have read, are true as I verily believe.

(Signed) L. A. HALLOWELL.

Subscribed in my presence and sworn to before me by the said L. A. Hallowell this 11th day of December, A. D., 1903.

(Signed) ARTHUR W. DAVIS,
Notary Public, Pocahontas County, Iowa.

7 EXHIBIT "A" (EX. "2" OF EVIDENCE).

EMMETSBURG, IOWA, —— —, 190–.

Know all Men by These Presents:

That we have this day sold to —— Special guarantee on life: If Gambette V dies from any cause whatsoever before the last payment is due, we agree to replace him with another Three Thousand Dollar stallion for one-half the purchasing price, in consideration of the sum of Three Thousand Dollars, the receipt whereof is hereby acknowledged.

GUARANTEE.—If the above named stallion does not get sixty per cent of the producing mares with foal, with proper care and handling, we agree to replace him with another stallion of the same price,

upon delivery to us of the said stallion in as sound and as good condition as he is at present. This is the only contract or guarantee given by us, and it is not to be changed or varied by any promises or representations of the Agent.

McLAUGHLIN BROS.
J. T. CHAMBERS, *Agent.*

EXHIBIT "B" (EX. "6" OF EVIDENCE).

EMMETSBURG, IOWA, *April* 16, 1902.

Know all Men by These Presents:

That we have this day sold to N. L. Norton, N. P. Barron, F. W. Rice et al. of Fonda, Iowa, the imported Percheron Stallion, Chantilly, in consideration of the sum of another Stallion named Gambette V. the receipt whereof is hereby acknowledged.

GUARANTEE.—If the above named Stallion does not get sixty per cent of the producing mares with foal with proper care and handling, we agree to replace him with another stallion of the same
8 price, upon delivery to us of the said Stallion in as sound and as good condition as he is at present. This is the only contract or guarantee given by us, and it is not to be changed or varied by any promise or representations of the agent.

(Signed) McLAUGHLIN BROS.

EXHIBIT "C" (EX. "1" OF EVIDENCE).

EMMETSBURG, IOWA, *Feb.* 25, 1903.

Know all Men by These Presents:

That we have this day sold to L. A. Hallowell, N. Barron, S. McKinney, A. Molton et al. the Imported Percheron Stallion, Rotignon (44397) 29491, in consideration of the sum of another stallion named Chantilly the receipt whereof is hereby acknowledged.

GUARANTEE.—If the above named stallion does not get sixty per cent of the producing mares with foal, with proper care and handling, we agree to replace him with another Stallion of the same price, upon delivery to us at any one of our established offices where any one of us reside of the said stallion in as sound and as good condition as he is at present. This is the only contract or guarantee given by us and it is not to be changed or varied by any promises or representations of the agent.

(Signed) McLAUGHLIN BROS.

And on the same date the plaintiffs filed in said court their Attachment Bond.

And the same date there was duly issued in said cause by the Clerk of said court a Writ of Attachment to the Sheriff of Pocahontas County, Iowa, who thereupon thereunder garnished
9 the United States Express Company, by serving on such garnishee Notice of Garnishment and made return of such service on the 22nd day of December, 1903.

On the 19th day of January, 1904, it being the first day of the regular January Term, 1904, of said court, the said defendants filed in the office of the Clerk of said court their

Petition for Removal

as follows:

Come now the above named defendants, and respectfuly show to the court that they are a co-partnership composed of John R. McLaughline and James B. McLaughlin, sole partners in and members of said co-partnership, doing business at the City of Columbus, in the State of Ohio. That at the time of the commencement of this action, and ever since and now, the said co-partnership, McLaughlin Brothers, and the said James B. McLaughlin, and John R. McLaughlin, and each of them, were and are residents, citizens, and inhabitants of the State of Ohio, and neither the said partnership, nor any member thereof was at the time of the commencement of the said action, or is now a resident, citizen, or inhabitant of the State of Iowa. That the plaintiffs herein above named, and each of them, at the time of the commencement of this action, were and still are residents, citizens, and inhabitants of the state of Iowa, and not of the State of Ohio. That there is a controversy in this suit between the plaintiffs and the defendants herein wherein the matter in dispute exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars, to-wit, the plaintiffs herein, by their petition, claim of the defendants, the sum of Three Thousand Dollars with interest and costs of this action, to which reference is hereby made. These defendants show to the court that they dispute and deny the allegations of the plaintiffs' petition. And, now, to-wit, before the time at which the said defendants are required by the laws of the State of Iowa, and the rules of this court, to answer or plead to the plaintiffs' petition these defendants do make and file herewith a bond with good and sufficient sureties for their entering into the Circuit Court of the United States, in and for the Northern District of Iowa, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said Circuit Court if said court shall hold that said suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in said suit, if special bail was originally requisite therein. And the said defendants do respectfully petition the court to accept this their said petition for removal of said cause to said Circuit Court of the United States in and for the Northern District of Iowa, and to accept the said bond, and to proceed no further herein, and to remove this cause to the said Circuit Court of the United States in and for the Northern District of Iowa, as is provided by the statutes of congress of the United States in such case made and provided. And you- petitioners will ever pray, etc.

Filed Jan. 19, 1904, P. M. Beers, Clerk.

(Duly signed and verified.)

And the said defendants at the same time and with the said petition for removal filed their

Bond for Removal.

Know all Men by These Presents:

That we, McLaughlin Brothers as principal and Geo. J. Consigny, Jr. and M. L. Brown, as sureties are held and firmly bound unto L. A. Hallowell, N. Barron, A. Moulton, S. Barron, N. Norton and Lars Larson in the penal sum of Five Hundred Dollars
11 ($500.) for the payment of which sum, well and truly to be made unto the said L. A. Hallowell, N. Barron, A. Moulton, S. Barron, N. Norton and Lars Larson their heirs, and assigns we bind ourselves, our heirs, representatives and assigns, jointly and severally firmly by these presents.

The condition of the foregoing bond is such that whereas the said L. A. Hallowell, N. Barron, A. Moulton, S. Barron, N. Norton, and Lars Larson have commenced in the District Court of the State of Iowa, in and for Pocahontas County, an action against the said McLaughlin Brothers, a co-partnership, and whereas, the said McLaughlin Brothers, a co-partnership, have petitioned the District Court of the State of Iowa, in and for Pocahontas County, for the removal of the said cause therein pending to the Circuit Court of the United States in and for the Northern District of Iowa, now if the said McLaughlin Brothers, a co-partnership, petitioner aforesaid, shall enter into the said Circuit Court of the United States in and for the Northern District of Iowa, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, in and for the Northern District of Iowa, if said Court shall hold that the said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail, in such suit, if special bail was originally requisite therein, then this obligation to be void, otherwise to be and remain in full force and virtue.

Witness our hands and seals this 14th day of January, A. D., 1904.

(Signed) McLAUGHLIN BROTHERS,
By T. D. McLAUGHLIN,
GEO. J. CONSIGNY, JR.,
M. L. BROWN.

12 (Duly acknowledged and sureties' justification in due form.)

Endorsed: Approved Jan. 19, 1904. P. M. Beers, Clerk; Filed Jan. 19, 1904, P. M. Beers, Clerk.

And on the 5th day of December, 1904, there was filed in the office of the Clerk of the said District Court of Pocahontas, Iowa, a duly authenticated copy of

Order Remanding Cause

as follows:

Now on this 18th day of November, A. D., 1904, this cause comes before the court upon the motion of plaintiffs for an order remanding said cause to the court from whence the same came into this court, and the court being advised in the premises finds that this court has not jurisdiction of said cause and sustains said motion.

It is ordered and adjudged that said cause be and the same is hereby remanded to the District Court of Iowa, in and for Pocahontas County from whence the same came, this court not having jurisdiction by reason of lack of evidence in the transcript filed herein, that said defendant had been served with notice of said proceedings.

And it is further ordered and adjudged that said L. A. Hallowell, N. Barron, A. Moulton, S. Barron, N. Norton and Lars Larson, plaintiffs, have and recover of and from McLaughlin Bros. their costs in this court adjudged and taxed at $10.35 and that execution issue therefor.

And on the 16th day of January, 1905, it being the first day of the regular January Term, 1905 of said court, John R. McLaughlin and James B. McLaughlin appeared in said cause and filed therein their

duly entitled in the action as follows:

Come, now, John R. McLaughlin and James B. McLaughlin, and show to the Court that they are the sole members and partners in the above mentioned firm of McLaughlin Brothers, and the sole parties defendant in interest herein, and that they are the parties and the sole parties that are sued under the firm name of McLaughlin Brothers; that at the time of the commencement of this action, they, and their said firm, were, and ever since have been and are now, citizens, residents and inhabitants of the State of Ohio, and have not been, and are not now citizens, residents or inhabitants of the State of Iowa; that the plaintiffs and each of them at the time of the commencement of this action were, and still are, residents, citizens, and inhabitants of the State of Iowa, and not of the State of Ohio; that there is a controversy between the plaintiffs and these applicants wherein the matter in dispute, exclusive of interest and costs, exceeds the sum or value of Two Thousand Dollars ($2,000.), and that these parties are entitled to have this action tried in the Circuit Court of the United States in and for the Northern District of Iowa; that the only effect of maintaining this action against these defendants in their partnership name is to prevent a removal of the action to the said United States Circuit Court.

Wherefore, the said John R. McLaughlin and James B. McLaughlin move the court.

1. For an order herein substituting these defendants in their

individual names as sole parties defendant herein, and permitting them to appear herein and answer and defend in their said individual names.

2. If the foregoing is overruled, then, that an order be made joining the said John R. McLaughlin and James B.
14 McLaughlin as parties defendant herein, in their individual names and permitting them to appear, answer, and defend in their individual names.

(Duly signed and verified.)

Duly endorsed: Filed Jan. 16, 1905. P. M. Beers, Clerk.

And the same date the said defendants, McLaughlin Bros. appeared in said cause ad filed therein their

Application for Substitution of Parties, etc.

duly entitled in the action as follows:

Come now the defendants and show to the court that they make a part hereof, all of the statements and allegations contained in the motion of John R. McLaughlin and James B. McLaughlin, for substitution of parties defendant, filed herewith, and the defendants therefore move the court.

1. That the said John R. McLaughlin and James B. McLaughlin be substituted in place of the defenadnts, McLaughlin Brothers, as sole parties defendant herein, and that they be permitted to appear, answer, and defend in their individual names.

2. If the foregoing is overruled, then that the said John R. McLaughlin and James B. McLaughlin be joined as parties defendant herein and be permitted to appear, answer and defend*ant* in their individual names.

Endorsed: Filed January 16, 1905, P. M. Beers, Clerk.

And at the same time, to-wit, January 16, 1905, the said defendants and John R. McLaughlin and James B. McLaughlin filed in the office of the Clerk of said court their

15 Petition for Removal

duly entitled in said action as follows:

Come now, John R. McLaughlin and James B. McLaughlin and respectfully show to the court that the said John R. McLaughlin and James B. McLaughlin are the sole partners in and members of the co-partnership, McLaughlin Brothers, and the sole parties defendant in interest herein; that at the time of the commencement of this action, and ever since, and now, the said McLaughlin Brothers, and each and every member and partner therein, and the said James B. McLaughlin and John R. McLaughlin and each of them, were and ever since have been and are now, residents, citizens, and inhabitants of the State of Ohio, and neither of them

have been, or are citizens, residents, or inhabitants of the State of Iowa; that the plaintiffs herein and each of them at the time of the commencement of this action were and ever since have been and are now residents, citizens and inhabitants of the State of Iowa; that there is a controversy in this suit between the plaintiffs and the defendants herein, wherein the matter in dispute exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars to-wit: The plaintiffs claim of the defendants herein the sum of Three Thousand Dollars with interest and costs of this action and these defendants dispute and deny the allegations whereon the plaintiffs claim to recover the said sum, or any sum. And now, to-wit, before the time at which the said defendants are required by the statutes of the State of Iowa, or the rules of this court, to answer or plead to the plaintiffs' petition, these defendants do make and file herewith bond with good and sufficient sureties as conditioned by the statutes of Congress to that end enacted, and respectfully petition the Court to accept this their said petition for removal of said cause to the Circuit court of the United States in and
16 for the Northern District of Iowa, and to accept the said Bond and to proceed no further therein, but to remove this cause to the said Circuit Court of the United States in and for the Northern District of Iowa.

(Duly signed and verified.)

And at the same time the said John R. McLaughlin and James B. McLaughlin and McLaughlin Brothers, filed in the office of the said Clerk their

Bond for Removal

duly entitled in said action as follows:

Know all Men by These Presents:

That we, John R. McLaughlin and James B. McLaughlin, sole partners in and members of the co-partnership of McLaughlin Bros., and the said McLaughlin Bros., as principals, and George J. Consigny, Jr., and M. L. Brown, as sureties are held and firmly bound unto L. A. Hallowell, N. Barron, A. Moulton, S. Barron, N. Norton, and Lars Larson in the penal sum of Five Hundred Dollars for the payment of which sum well and truly to be made unto the said L. A. Hallowell, N. Barron, A. Moulton, S. Barron, N. Norton, and Lars Larson, their heirs and assigns we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents.

The condition of the foregoing bond is such that whereas the said L. A. Hallowell, N. Barron, A. Moulton, S. Barron, N. Norton, and Lars Larson have commenced in the District Court of the State of Iowa, in and for Pocahontas County, an action against the said McLaughlin Bros., a co-partnership, and whereas, the said John R. McLaughlin and James B. McLaughlin, sole partners in, and members of said firm of McLaughlin Bros., and the said McLaughlin

Bros., have petitioned the District Court of the State of Iowa
17 in and for Pocahontas County, for the removal of said cause therein pending to the Circuit Court of the United States in and for the Northern District of Iowa.

Now, if the said John R. McLaughlin and James B. McLaughlin sole partners in and members of the said firm of McLaughlin Bros., and the said McLaughlin Bros., petitioners aforesaid, shall enter into the said Circuit Court of the United States in and for the Northern District of Iowa, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said Circuit Court of the United States in and for the Northern District of Iowa, if said court shall hold that the said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in such suit, if special bail was originally requisite therein; then this obligation to be void, otherwise to be and remain in full force and virtue.

Witness our hands and seal this 30th day of December, A. D. 1904.

(Signed) JOHN R. McLAUGHLIN,
JAMES B. McLAUGHLIN,
McLAUGHLIN BROS.,
By THOS. D. McLAUGHLIN,
GEO. J. CONSIGNY, JR.,
M. L. BROWN.

(Duly acknowledged and sureties duly justified.)

Endorsed: Filed and approved January 16, 1905, P. M. Beers, Clerk.

On the 24th day of January, 1905, the plaintiffs filed in said action their

Objections to Motion for Substitution, etc.

1st. The said John R. McLaughlin and James B. Mc-
18 Laughlin are not entitled to file or make a motion for substitution and no legal reason or grounds appears or is shown therein for the making of such motion.

2nd. The said John R. McLaughlin and James B. McLaughlin are not parties to the above entitled action and are not named or joined as defendants thereto and are mere interlopers in making or filing the motion filed therein.

3rd. The plaintiffs herein are entitled to bring their action solely against the co-partnership of McLaughlin Brothers without joining as defendants, or naming as defendants the members of the said firm of McLaughlin Brothers, and said plaintiffs having exercised such rights and option and having elected to so sue the said co-partnership, the members of said firm are not, as against plaintiffs' objection, entitled to be either joined as parties or substituted as parties.

4th. It does not appear that any reasons exist why the joiner of any other parties or the substitution of any parties is necessary to protect the rights of any of the parties to such suit or of the persons moving for substitution.

5th. Because the said John R. McLaughlin and James B. McLaughlin are not entitled to any of the rights claimed in said motion and have no legal right to have a cause of action brought against a co-partnership tried in the Circuit Court of the United States; and it does not appear that the District Court of Iowa is in any way incompetent or disqualified to try and determine the matters in issue or to fully adjudicate and determine the rights of all the parties to this suit.

6th. Because it affirmatively appears that the plaintiffs have brought and are maintaining their action against a co-partnership as such, and it appears in this case that the debt sued for and claimed and cause of action embraced in plaintiffs' petition is one for which the co-partnership and legal entity may be under the Iowa statutes sequestered and such judgment satisfied, without seeking to
19 recover as against the individual members of the said co-partnership.

7th. Because the option and election belongs alone to the plaintiffs under the statutes of Iowa, to bring and maintain this action against a co-partnership as such, and it appears in this case that the debt sued for and claim and cause of action embraced in plaintiffs' petition is one for which the co-partnership itself is legally obligated.

8th. The plaintiffs make a part hereof all of the records and files in this cause with the same force and effect as though herein set out.

9th. The plaintiffs further move the court to strike from the files herein the said motion to substitute, etc., because not properly filed in this cause, and not filed by any legal party to this cause, and because the persons purporting to file the same are interlopers herein.

And on the 20th day of March, 1905, the said plaintiffs filed in said cause, their

Objections to Petitions for Removal, Etc.,

as follows:

1st. That said petition fails to show a compliance with the provisions of the federal statute and acts of Congress entitling the said defendants to a removal of said cause.

2nd. The petition for removal is filed too late and is not filed within the time required, to-wit, it is not filed within the time that the said defendants were required by the statutes and rules of practice in the State of Iowa to appear and answer in said cause.

3rd. The record in this case affirmatively shows that the said defendants are not entitled to the removal of this cause to the United States Circuit Court as prayed in said petition.

4th. The said petition for removal is not filed, nor is the said application for removal made by the sole party defendant in
20 this cause, but is made by certain persons not made parties to said suit and not entitled or authorized by law to apply for or to secure the removal of said cause.

5th. The record in this cause affirmatively shows that this suit was brought and was pending in the District Court of the State of Iowa in and for Pocahontas County at the January, 1904, term of said court, that the said suit was brought against McLaughlin Brothers, a co-partnership, as sole defendants, and that said McLaughlin Brothers appeared at said January, 1904, Term of said court; that the said defendants were required to answer at said term of court and by virtue of process and appearance in any event not later than at the March Term, 1904, of said court, that three several terms, and more than nine months have elapsed since the time when, by the statute of Iowa and the rules of practice in this court, the said defendants were required to appear and answer in said cause.

6th. The record in this cause affirmatively shows that there is no diversity of citizenship, which entitles the removal of this cause to the United States Circuit Court.

And on the 1st day of May, 1905, there was duly entered in said action the following:

Order Denying Petition for Removal, Etc.

And now, on this 25th day of April, 1905, this matter having come on for hearing in chambers, upon the agreement of both the plaintiffs and defendant the court after listening to the arguments and being duly advised finds, as follows, and it is hereby ordered:

1. That the exceptions of the plaintiffs to the motion for substitution of John R. McLaughlin and James B. McLaughlin are sustained and the motion to substitute the said John R. McLaughlin and James B. McLaughlin made by the defendant and said
21 John R. McLaughlin and James B. McLaughlin is denied and overruled.

2. That the exceptions filed by the plaintiffs to the motion and application of McLaughlin Bros., and John R. McLaughlin and James B. McLaughlin to permit the said John R. McLaughlin and James B. McLaughlin to join in the defense of said cause are sustained, and the motion and application of the said McLaughlin Bros., and the said John R. McLaughlin and James B. McLaughlin as parties defendant herein is overruled and denied.

3. The petition for removal of the case herein to the United States Circuit — is denied, and the exceptions to said petition and application for removal filed by the plaintiffs is sustained.

To all of the foregoing the defendants, John R. McLaughlin and James B. McLaughlin and each of them except.

(Signed) A. D. BAILIE.
Judge 14th Judicial District of Iowa.

And on the 16th day of May, 1905, the plaintiffs filed in said action their

Amendment to Petition

as follows:

Division V.

For other and further cause of action against the defendants, plaintiffs state:

That the defendant is a co-partnership, engaged in the business of importing and selling stallions. That the plaintiffs and their assignors, F. W. Rice, Frank Rice, John Tweddale, and S. W. McKinney, on or about the 1st day of April, 1902, entered into negotiations with the defendant for the purchase of a stallion, which negotia-
22 tions were continued as hereinafter set forth. That the said F. W. Rice, Frank Rice, John Tweddale and S. W. McKinney have assigned and transferred to the plaintiffs or some of them, all of their interest in the claim and cause of action hereinafter set forth, and that these plaintiffs are the owners of said claim and cause of action and entitled to sue and recover therefor.

That on or about the 1st day of April, 1902, the said defendants offered to sell to the plaintiffs and their assignors, a stallion for the price of $3000; that the said plaintiffs and their assignors desired to purchase such stallion for the purpose of breeding mares, and for no other purpose, and that the defendants at the time of the transaction herein set forth had full, specific and accurate knowledge and notice of the purpose for which said horse was desired, and that the furnishing and selling of said stallion and the exchange thereafter of said stallion for others was with the knowledge upon the part of the defendants that said stallion was purchased and designed for the purpose of breeding mares, and for no other purpose.

That thereafter the said defendants delivered to the plaintiffs and their assignors a certain stallion named "Gambetta V," for which the plaintiffs and their assignors paid the sum of $3,000. That at the time the said defendants delivered said stallion, said defendants well knew that said stallion was unfit for the purpose for which the plaintiffs and their assignors desired said stallion, and that said stallion was unfit for the purpose of breeding mares; that said defendants had notice and knowledge that said stallion had proved unsure and unable to get producing mares with foal, and the plaintiffs aver that the furnishing and delivering of said stallion under said contract was fraudulent, because of the facts hereinbefore set forth; that at said time said defendants delivered to the plaintiffs and their as-
23 signors, the certain writing, a copy of which is hereto attached, marked Exhibit "A" and made part hereof.

That thereafter, the said plaintiffs and their assignors, having learned of the fraud of the defendant and having learned that said stallion was unfit for the purpose for which he was designed, and that said defendants well knew such fact, returned said stallion to the defendants, and said defendants thereafter, and on or about the 16th day of April, 1902, delivered to the plaintiffs and their assignors, a certain other stallion named "Chantilly"; that the plaintiffs and their

assignors brought the said stallion Chantilly to Fonda, Iowa, where they kept him during the stud season of 1902, and during said season they bred said stallion to thirty-four mares, of which but a small percentage were got with foal.

That thereafter, the said plaintiffs and their assignors returned said stallion to the defendants because he was unsure and unable to get producing mares with foal, and on or about the 25th day of February, 1903, the plaintiffs and their assignors received from the defendant another stallion named "Rotignon;" that plaintiffs brought said Rotignon to Fonda, Iowa, where he was kept during the stud season of 1903, and was bred to a large number of mares, but that said stallion, although said mares were producing mares, failed to get more than a small percentage of said mares with foal.

The plaintiffs aver that the said stallions, and each of them, were properly cared for and were properly handled; that each and all of the said stallions were unsure and unable to get producing mares with foal; that said horses, and all of them, were wholly worthless and unfit for breeding purposes or for the purposes for which they were purchased by the plaintiffs and their assignors, and were unsuitable and unfit for the purpose for which they were purchased by the
24 plaintiffs and their assignors, or for which they were designed and sold by the defendants; that each and all of said stallions have utterly failed to prove reasonably sure foal getters, and have wholly failed to be of such reasonable service as to be of any value for the purpose for which plaintiffs and their assignors purchased said stallions, which purpose was well known to the defendants; that the said stallions, and each of them were so unserviceable for breeding purposes, and the said stallions and each of them, were able to get so small a percentage of producing mares to which they were bred, with foal, that said stallions, and each of them were totally unfit for breeding purposes and were of no value for that purpose and were of no value for any purpose.

The plaintiffs further aver that said horse Rotignon during the year, 1903, and shortly after the stud season for the year 1903, closed, and before the plaintiffs were able to certainly or definitely determine to what extent he had failed as a foal getter, and to what extent he had failed to be reasonably serviceable for the purpose for which he was sold and purchased, died, without any fault or negligence upon the part of the plaintiffs or their assignors. Upon information and belief, the plaintiffs aver the fact to be that the death of said horse was caused or contributed to by vice and unsoundness, with which the said horse was afflicted at the time he was delivered by the defendants to the plaintiffs, and that said defendant at the said time had knowledge of said vice and unsoundness.

The plaintiffs further aver that at the time of the delivery of the said horses Chantilly and Rotignon, there was delivered by the agent of the defendants to the plaintiffs, or their assignors, certain writings, copies of which are hereto attached, marked Exhibits "B" and "C," respectively, and made part hereof, but the plaintiffs aver that the said writings were not received or accepted as a substitution
25 for the express or implied contracts or warranties of the said defendants, made or given at the time the transactions here-

inbefore set forth were had, and at the time the consideration of $3000, was paid for said stallion.

The plaintiffs further aver that the consideration of the payment of the said sum of $3000, has wholly failed by reason of the fact hereinbefore set forth, and that the plaintiffs and their assignors received nothing of any value from the defendants for said consideration; that there has been a breach of the warranty implied by law that said stallions have been reasonably fit for the purpose for which they were designed and for which they were purchased by the plaintiffs and their assignors, with the knowledge of the defendants, and that by reason of the foregoing premises, the plaintiffs have been damaged in the sum of $3000, with interest from April 1, 1902.

Division VI.

That the defendant is a co-partnership engaged in the business of importing and selling stallions; that the plaintiffs and their assignors, F. W. Rice, Frank Rice, John Tweddale, and S. W. McKinney, on or about the 1st day of April, 1902, entered into negotiations with the defendant for the purchase of a stallion.

That the said F. W. Rice, Frank Rice, John Tweddale and S. W. McKinney, have assigned and transferred to the plaintiffs, or some of them, all of their interest in the claim and cause of action hereinafter set forth, and that these plaintiffs are the owners and holders of said claim and cause of action and are solely entitled to sue and recover therefor.

That these plaintiffs, and their assignors, being desirous of purchasing a stallion for breeding purposes, on or about said April
26 1, 1902, entered into negotiations with the said defendant to purchase such stallion; that the said defendant was informed and knew of the purpose for which said horse was wanted and sold him to the plaintiffs, and their assignors for that purpose, and for no other; that during the negotiations for the sale of said stallion, and before the purchase thereof, and before the consideration therefor was paid, the said defendant, by its agent, orally stated, represented and warranted that the said stallion, which the defendant would furnish and deliver, if the price and consideration demanded by defendant should, by the said plaintiffs, and their assignors, be paid would be a sure foal getter and would get not less than sixty per cent. of producing mares to which said horse should be bred, with foal, and that such horse would be sound and serviceable.

That the plaintiffs and their assignors, relying upon said statements, representations and warranty, agreed with the said defendant to purchase stallion from defendant and paid to the defendant the price and consideration demanded for such stallion, as so represented and warranted, to-wit, the sum of $3,000., and that the said defendant thereupon delivered to the plaintiffs, and their assignors, a certain stallion named "Gambetta V."

The plaintiffs further aver that the defendants at the time well knew that said stallion was unfit for the purpose for which the plaintiffs and their assignors desired said stallion and well know that the said stallion was unfit for breeding purposes; that said defendant

had notice and knowledge that said stallion had proved unsure and unable to get producing mares with foal, and that said stallion would not fulfill the representations and warranty which had been made by the said defendant, and the plaintiffs aver that the said defendant in furnishing and delivering such stallion and in making the said warranty and representations was guilty of fraud, de-
27 ceit and misrepresentation, because of the facts herein averred.

That at the time said defendant delivered to the plaintiffs and their assignors, the said stallion, there was delivered a certain writing, a copy of which is hereto attached, marked Exhibit "A" and made part hereof.

That thereafter, the said plaintiffs and their assignors having learned of the fraud of the defendant, and that said stallion was unfit for the purpose for which he was designed, and that said defendant well knew such fact, returned the said stallion to the defendant, and said defendant thereafter, and on or about the 16th day of April, 1902, delivered to the plaintiffs and their assignors, a certain other stallion named "Chantilly"; that the plaintiffs and their assignors brought said stallion "Chantilly" to Fonda, Iowa, where they kept him during the stud season of 1902, and during said season bred said stallion to a large number of mares, to-wit, to about thirty-four mares of which but a small percentage were got with foal.

That thereafter, the said plaintiffs and their assignors returned said stallion to defendant, because he was unsure and unable to get producing mares with foal, because he was wholly unable to fulfill the warranty or come up to the representations which the defendant made, and on or about the 25th day of February, the plaintiffs and their assignors received from the defendant another stallion named "Rotignon"; that plaintiffs brought said Rotignon to Fonda, Iowa, where he was kept during the stud season of 1903, and was bred to a large number of mares, but that said stallions, although said mares were producing mares, failed to get more than a small percentage of said mares with foal. (1)

The plaintiffs aver that the said stallions, and each of them, were properly cared for and were properly handled; that
28 each of the said stallions were unsure and unable to get producing mares with foal; that said horses, and each of them, were wholly worthless and unfit for breeding purposes, and for the purpose for which they were purchased by the plaintiffs, and their assignors, and were unsuitable and unfit for the purpose for which they were purchased, and for which they were designed and sold by the defendant; that each of said stallions wholly failed to fulfill the warranty or representations made by the said defendant; that said stallions, and each of them, were unserviceable for breeding purposes and were wholly unable to get sixty per cent. of producing mares with foal, and were able to get so small a percentage of producing mares to which they were bred with foal, that said stallions, and each of them, were totally unfit for breeding purposes and were of no value for that purpose, and were wholly worthless and of no value for any purpose.

The plaintiffs further aver that they and their assignors in purchasing said stallion and paying said consideration of $3,000 relied upon said warranty and representations and believed the same to be true and were thereby induced to pay the said consideration of $3,000, and they would not have paid the same if they had not relied thereon, and if said representations and warranty had not been made.

The plaintiffs further aver that said horse Hotigmon during the year 1903, and shortly after the close of the said season for that year, without any fault or negligence upon the part of the plaintiffs and their assignors, died. [illegible]

The plaintiffs further aver that said horse was unsound and was afflicted with vice and unsoundness at the time he was delivered by the defendant to the plaintiffs and their assignors, and that the said defendant well knew of such vice and unsoundness.

The plaintiffs further aver that at the time of the delivery of the said horses Chantilly and Hotigmon there was delivered
29 by the defendant to the agent of the plaintiffs certain writings, copies of which are hereto attached, marked Exhibit "B" and "C", respectively.

The plaintiffs aver that the writings Exhibits "A", "B" and "C" were not received or accepted as a substitution for the express or implied contract of warranty of the said defendant made and given at the time of the transactions hereinbefore set forth and at the time of the payment of said consideration of $3,000 to the defendant.

The plaintiffs further aver that the consideration for the payment of the said sum of $3,000 has wholly failed by reason of the facts hereinbefore set forth, and because of plaintiffs and their assignors receiving nothing of any value from said consideration, and because the said defendant parted with nothing of any value.

The plaintiffs further aver that there has been a breach of the said warranty and that the representations have been and are untrue, and that the said stallion wholly failed to fulfill the said warranty or representations.

Plaintiffs further aver that if the said stallion had been as he was represented and warranted to be, and further aver that if the said defendant had delivered to the plaintiffs and their assignors a stallion of the kind which it agreed to deliver, and of a kind sufficient to meet the conditions of the said warranty and representation, he would have been worth the sum of $3,000, and that by reason of the foregoing premises, the plaintiffs have been damaged in the sum of $3,000, with interest thereon from April 1, 1902.

Wherefore, Plaintiffs demand judgment against the defendant for the sum of $3,000, with interest from April 1, 1902, and costs.

And on the 7th day of June, 1905, the plaintiffs filed in said cause their

30 *Amendment to Petition.*

as follows:

1. That the vice and unsoundness with which the said horse Rotignon was afflicted at the time he was delivered by the defendant to the plaintiffs consisted in the fact that the said horse was a "cribber" or "stump sucker".

2. That the agents or representatives of the defendant who made the certain oral warranties and representations referred to in the amendments hereinbefore filed, were J. T. Chambers and T. D. McLaughlin.

And on the 19th day of October, 1905, the plaintiffs filed the following:

Amendment to Petition.

Plaintiffs further amend their petition by inserting on the last page of Division VI thereof, immediately following the 14th line from the top of said page (marked by *) the following towit:

That the said writings were not read to or by the plaintiffs at the time they were so delivered or to or by any agent for plaintiffs; that plaintiffs had no knowledge of the contents thereof until, after the breach of the warranties, as herein averred; that plaintiffs never assented to the writings nor to the provisions therein expressed. That none of said writings were delivered at or before the time said horses were bargained for, and that each of said horses was purchased and the consideration therefor paid or delivered, and the contract of sale completed before the pretended delivery of said papers to the plaintiffs or any one of them.

31 And thereafter the plaintiffs filed

Amendment to Petition.

by adding the following:

1. Immediately following the fourth line on the 3" page of Division VI, (designated above "1") the following allegation is inserted: Plaintiffs allege that at the time of the selection and delivery of said Rotignon, defendants by their agent T. D. McLaughlin, orally warranted and represented that said Rotignon was a sure foal getter and would get not less than sixty per cent of producing mares to which he should be bred, with foal and that said Rotignon was sound.

2. By adding at the bottom of said page (designated above "2") the following: That before the death of said horse and while he was in as sound and as good condition as he was when received from defendants, defendants through T. D. McLaughlin refused, though demanded so to do, to replace him with another stallion of the same price.

And on the 21st day of August A. D., 1905 the defendants filed the following:

Plea to Jurisdiction and Answer.

Come now the defendants and object to the jurisdiction or power of this court to compel them to appear and answer in the aforesaid action, and plead to the jurisdiction of this court, and show that this court ought not to compel these defendants to appear or to answer in the aforesaid action, for that at the time of the commencement of this action and ever since and now these defendants and John R. McLaughlin and James B. McLaughlin, sole partners and members of the defendant firm of McLaughlin Bros. were and each of them was and still is a resident, citizen, and inhabitant of
32 the State of Ohio, and neither of them was or has since been, or is now a resident, citizen or inhabitant of the State of Iowa; that the plaintiffs and each of them at the time of the commencement of this action, were and ever since have been and are now residents, citizens and inhabitants of the state of Iowa; that there is a controversy in this suit between the plaintiffs and the defendants herein, wherein the matter in dispute exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars; that before the time at which the said defendants were required by the laws of the State of Iowa or the rules of this court to answer or plead to the plaintiffs' petition, the defendants and the said John R. McLaughlin and James B. McLaughlin duly filed herein their several applications for the substitution or joinder of the said John R. McLaughlin and James B. McLaughlin as parties defendant herein; and the said defendants and the said John R. McLaughlin and James B. McLaughlin have heretofore herein duly filed their several petitions for the removal of this cause to the Circuit Court of the United States in and for the Northern District of Iowa, and duly made and filed their several bonds and with good sufficient sureites, conditioned as provided by the statutes of Congress of the United States. And the defendants do now make a part hereof the petition for removal heretofore filed by McLaughlin Bros., herein, bond for removal, filed by them, the application and motions for substitution of parties filed by the defendants, and by John R. McLaughlin and James B. McLaughlin herein; and the petition for removal, and bond for removal, filed by the said John R. McLaughlin and James B. McLaughlin, and the defendants make a part hereof all of the said application and motion for substitution of parties, by reference as fully as if set out at length herein; and say that by reason of the premises, this court has no jurisdiction to proceed further herein;
33 and that the Circuit Court of the United States in and for the Northern District of Iowa has sole and exclusive jurisdiction to proceed further in this action; that these defendants claim the right to plead and to have this action tried in the said Circuit Court of the United States in and for the Northern District of Iowa, and under and in virtue of the constitution, statutes and laws of Congress of the United States of America.

Division II.

These defendants deny each and every allegation in the plaintiffs' petition contained, except such as are herein specifically admitted. The defendants admit that they are non-residents of the State of Iowa; and that they are co-partners, with headquarters at Columbus, Ohio, conducting the business of importing and selling Percheron and French coach stallions. Defendants admit that on or about the first day of April, 1902 these defendants sold to the plaintiffs, by written contract a certain stallion named "Gambetta V", for which the plaintiffs agreed to pay the defendants the sum of Three Thousand Dollars ($3,000). The defendants admit that an exchange was afterwards made whereby the said defendants received the said stallion named "Gambetta V" from the plaintiffs and delivered in exchange to the plaintiffs a certain other stallion named "Chantilly", and that the defendants delivered to the plaintiffs herein a certain written contract, a purported copy whereof is set out in the petition herein. These defendants admit that they afterwards received from the plaintiffs the said stallion "Chantilly", and delivered in exchange to the plaintiffs herein, a certain other stallion named "Rotignon" and that the defendants delivered to the plaintiffs a certain written contract with respect to said stallion a purported copy whereof is attached to the petition herein.

34 Division III.

The defendants for further answer and defense herein show to the court that any alleged claim or cause of action of the plaintiffs on account of the sale of the said stallion "Gambetta V" to the plaintiffs has been settled, satisfied and discharged by the return of the said stallion to these defendants, and the acceptance of him by these defendants, and the exchange of the said stallion "Chantilly" therefor. That any alleged claim or cause of action on account of the said sale of the said stallion "Chantilly" to the plaintiffs has been settled, satisfied and discharged by the return of the said stallion "Rotignon" to the plaintiffs therefor. That all of the plaintiffs' alleged claims or causes of action with reference to the said stallions "Gambetta V" and "Chantilly" have been fully settled, satisfied, and discharged, by reason of the matters aforesaid, and under and in virtue of the provisions of the said contracts set up in the plaintiffs' petition.

Division IV.

For further answer and defense, the defendants herein show that the said stallion "Rotignon" was selected by the plaintiffs before the same was delivered to them, and was by the plaintiffs thus selected out of a large number of stallions, as the one which they would take and accept, and which should be delivered to them; and the said stallion "Rotignon" was specifically sold and exchanged by the defendants to the plaintiffs after inspection and selection by the plaintiffs as aforesaid; and on the written contract set out in the plaintiffs' petition and the plaintiffs had equal knowledge with the defendants

and used and exercised their own knowledge and judgment, and took and accepted the said written contract, and took, received and accepted the said stallion "Rotignon" and have never returned the same to the defendants; and the plaintiffs have never performed their part of the said contract in the petition set out.

Division V.

That the only contract made by these defendants with the plaintiffs in respect to said stallion "Rotignon", was that of which a copy is set out in the petition as Exhibit "C"; and that said contract was made as set out in Exhibit "C", and these defendants have always been willing and ready to fully perform and carry out the same, but the plaintiffs have always failed and refused to perform the same on their part; that the plaintiffs in violation of their said contract, demanded of the defendants that the plaintiffs have the privilege of taking their pick of the defendants' horses at the agreed price, with the defendants' guaranty that he would produce sixty per cent. of mares in foal; and the plaintiffs by reason of the premises have wholly repudiated and broken their said contract, and have waived performance upon the part of these defendants.

Wherefore defendants pray judgment dismissing plaintiffs' petition at the plaintiffs' cost.

And on the 20th day of October, 1905 the defendants filed the following.

Answer to Third Amendment to Petition.

(1) The defendants for answer to the third amendment to the petition herein, being the same filed October 19, 1905, deny each and every allegation in said amendment contained, and admit and aver that the said horses described in said petition herein were respectively sold and delivered by the defendants to the plaintiffs upon the written contracts, copies of which are attached to the petition, and aver that the plaintiffs herein, at all times had full knowledge of the said contracts, and accepted and entered into the same at the time of sale and delivery of said respective horses, and fully assented thereto, and that the same are the contracts, and the only contracts upon which the said horses were respectively sold by the defendants, purchased by the plaintiffs and delivered.

(2) These defendants aver that the plaintiffs herein brought this action and filed therein their petition wherein they do aver that the said horses in the petition referred to were sold by the defendants to them upon the written contracts, copies of which are set out in the petition, and they especially aver in their said petition that these defendants sold to the plaintiffs by written contracts, a copy of which is attached to said petition, marked "Exhibit C", and made a part of said petition, the stallion named "Rotignon" and they aver that the said stallion named "Gambetta V" was sold by defendants to plaintiff by written contract, a copy of which is attached, and made

a part of said petition, marked "Exhibit A", and that the said stallion named "Chantilly" was sold by the defendants to plaintiffs on the written contract made a part of said petition as "Exhibit B", and these defendants admit of record herein that said stallions were respectively sold by these defendants to the plaintiffs, upon the said written contracts respectively. The defendants aver that the said plaintiffs brought this action, making said allegations, claiming the benefit of said written contracts, respectively, seeking to recover thereon, and demanding judgment against these defendants thereon, and thereon they sued out a writ of attachment herein and caused the property of these defendants to be garnishe-d, and thereby caused and compelled these defendants to come into court and submit to the jurisdiction thereof; that by reason of the premises, the plaintiffs have elected to ratify the said contracts, and the plaintiffs are estopped from now denying the validity of said contracts.

37-103 And thereafter, and after further amendments by plaintiffs, the defendants filed the following

Answer to Amendment to Petition.

Answering the amendments to the petition the defendants reiterate and apply thereto all the allegations and denials of the answer on file herein, and further deny the allegations of the said amendment except in so far as in the answer, and herein admitted, and aver that the parties entered into the written contract set out in the petition and amendments thereto, and that the plaintiffs executed and made claim against the defendants, and brought actions thereon, withheld and concealed from said defendants the alleged death of the said horse for about one and one half years after this action was commenced, and founded, and made their claims against these defendants, and brought their actions upon the written and alleged implied warranties that said horse would get 60 per cent of the producing mares with foal, and accepted and elected to rely and bring action thereon, caused these defendants to incur expense in the premises, and are now barred and estopped from changing their ground, and now set out the alleged oral agreements and representations.

And the cause came on for trial on the foregoing issues before the said court, Hon. D. F. Coyle, Judge, and a jury, duly empaneled on the 21st day of January, 1908, and the following proceedings were had:

Plaintiffs' Evidence.

* * * * * * *

104 Defendant offers in evidence the record of filings in this
105 cause as the same is contained in the appearance docket No. 184, case No. 2498, as follows:

Service on whom.	When.	Kind of service.
Notice of Appeal.		
E. A. Morling, Atty	Dec. 21, 1905	Accepted.
P. M. Beers, Clerk Dist. Ct	" 26, 1905	"
Kind of Papers and Pleadings Filed.		
Petition and copy	Dec. 16, 1903	
Order of Court	" " "	
Attachment Bond	" " "	
Writ of Attmnt. & Notice of Garnishment	Dec. 22, 1903	
Additional Bond	" 30, "	
Answer of Garnishee	Jan. 15, 1904	
Petition for removal & Copy	" 18, 1904	
Bond for removal	" " "	
Order	Jan. 28, 1904	
Certified copy of order to remand	Dec. 5, 1904	
Motion for substitution & Copy	Jan. 16, 1905	
Appr. for substitution of parties	" " "	
Petition for removal	" " "	
Bond for removal	" " "	
Trial Notice	Mar. 2, 1905	
" "	" 6, 1905	
Exceptions and objections to removal & Copy	" 20, "	
Order of court	May 1, 1905	
Motion to strike	" 4, "	
" "	" 3, "	
Amendment to Petition	" 16, "	
106 Motion for more specific Statement	" " "	
Third Amendment to Pltff. Pet	Jan. 7, 1905	
Trial Notice	Oct. 2, 1905	
Plea to the juri-diction and Ans	Aug. 21, 1905	
Amendment to Amended Petition and Ans.	Oct. 19, 1905	
Motion and Copy	Oct. 17, 1905	
Answer to Amendment to Petition and Copy	Oct. 19, 1905	
Amendment to Amended Petition & Copy	Oct. 19, 1905	
Answer to the Third Amendment to Petition	Oct. 20, 1905	
Verdict of Jury	Oct. 21, 1905	
Transcript of Evidence	Oct. 27, 1905	
Notice of Appeal, filed by Pltff	Dec. 26, 1905	
Procedendo, filed by Pltff	Nov. 25, 1907	
Notice of Suing out Com. Interrogatories, objections and Exceptions thereto and cross interrogatories	Dec. 30, 1907	
Trial Notice	Jan. 3, 1908	

Interrogatories and Notice to take depositions of J. T. Chambers.....Jan. 3, 1908
Objections to take deposition of J. T. Chambers and Copy.....Jan. 7, 1908
Motion to Suppress and Copy.....Jan. 21, 1908
Deposition of J. T. Chambers.....Jan. 21, 1908
Amendment to Answer.....Jan. 22, 1908

107–111 Defendant offers in evidence petition for removal of this cause filed January 18, 1904, and the bond for removal, filed herein January 18, 1904, and the certified copy of order to remand, filed herein December 5th, 1904, and the motion for substitution of parties, filed herein January 16th, 1905; the application for substitution of parties filed herein January 16, 1905, the petition herein for removal, filed herein January 16, 1905, the bond for removal, filed herein Jan. 16, 1905 (All of which are set out hereinabove). Objected to as incompetent, irrelevant, immaterial. The objection of incompetency does not apply to the failure to identify the record or docket which is offered, but the objection goes to the substance of the offer. And it is further objected to because the record of this court in this case are matters of record. And the further objection is made that the matters offered are wholly immaterial, and cannot in any manner affect this case. They are irrelevant to any issue in this case, or to be submitted to the jury.

The COURT: I will sustain the objections, *the* leave the matter right where Judge Bailie left it. Defendant excepts.

* * * * * * *

112 Defendant thereupon made

Motion to Direct Verdict

as follows:

The defendants now further move the Court to direct a verdict in favor of the defendant for all of the reasons set forth in the motion therefor made at the close of the introduction of the plaintiffs' testimony in chief. (Set out above.)

2. Because there is no competent evidence in the record upon which a recovery herein can be sustained.

3. Because upon the evidence as it now stands if a verdict is returned for plaintiffs it would have to be set aside as contrary to the evidence.

4. For all of the reasons set forth in the foregoing motions.

5. Upon the ground that this Court has no jurisdiction of the action by reason of the proceedings for removal of the cause to the Circuit Court of the United States in and for the Northern
113 District of Iowa. And the defendants expressly claim that under the laws of Congress of the United States this Court has no jurisdiction to proceed further with this case and it will have no jurisdiction to render judgment herein against the defendant.

Motion overruled. Defendant excepts.

And the foregoing is all of the evidence offered, introduced or received upon the trial of the foregoing action, together with the objections and motions thereto and the orders and rulings of the court thereon or made during the trial of the case, and exceptions thereto and the same was duly taken down at the time in shorthand by the official shorthand reporter of the said court, and duly certified by the official shorthand reporter and Hon. D. F. Coyle, Judge of said court, on the 24th day of January, A. D., 1908 and on said date duly filed in said action and made of record therein; and the same was thereafter duly transcribed by the official shorthand reporter, and transcript properly certified duly filed in said cause on the 20th day of June, A. D., 1908.

And thereafter on the 24th day of January, A. D. 1908 the court gave to the jury the following

Instructions.

I.

The plaintiffs for their claim and cause of action against the defendant alleges that the defendant is a co-partnership engaged in the business of importing and selling stallions, and that on or about February 25, 1903, the plaintiffs and four other men purchased a stallion named "Rotignon" from the defendant, and that the consideration which they gave for him was another stallion named "Chantilly," and that during the negotiation for the exchange
114 of the said stallion "Chantilly" for the said stallion "Rotignon" the defendant by its agent T. D. McLaughlin orally warranted and represented that the said stallion "Rotignon" was a sure foal getter and would get not less than sixty per cent of the producing mares to which he should be bred with foal, and that said "Rotignon" was sound, and the plaintiffs also alleged that they and their co-purchasers relied upon the said representations, and believed the same to be true and were induced thereby to pay the consideration for him, and would not have paid it if the said representations had not been made. And the plaintiffs allege that the said stallion was properly handled and cared for but that he wholly failed to comply with the said representations and failed to prove a reasonably sure foal getter and failed to get sixty per cent of the producing mares to which he was bred with foal, and that he was unsound and was afflicted with a vice or unsoundness at the time he was delivered to plaintiffs and their co-purchasers to-wit, the habit of "cribbing," and that the said stallion died shortly after the close of the stud season in 1903, without any fault or negligence on the part of plaintiffs and their co-purchasers. And the plaintiffs also allege that if the said stallion had been as they allege he was represented, to-wit, a reasonably sure foal getter, and able to get sixty per cent of the producing mares to which he was bred with foal and had been sound he would have been worth $3000, but that he was actually of no value for any purpose, and plaintiffs allege that by reason of the foregoing facts

they and their co-purchasers were damaged in the sum of $3000, and that their co-purchasers have assigned all their right, title and interest therein to the plaintiffs.

The plaintiffs further allege that at the time of the delivery of the said stallion "Rotignon" the defendants delivered to plaintiffs and their co-purchasers a certain writing, in words as follows, to-wit:

115 "EMMETSBURG, IOWA, *February* 25, 1903.

Know all men by these presents: That we have this day sold to L. A. Hallowell, N. Barron, S. McKinney, et al., the imported Percheron Stallion "Rotignon" (44387) 29491 in consideration of the sum of another stallion named "Chantilly" the receipt whereof is hereby acknowledged. *Guarantee*: If the above named stallion does not get sixty per cent. of the producing mares with foal, with proper care and handling, we agree to replace him with another stallion of the same price, upon delivery to us at any one of our established offices, where any one of us reside, if the said stallion is in as sound and as good condition as he is at present. This is the only contract or guarantee given by us and it is not to be changed or varied by any promises or representations of the agents.

(Signed) McLAUGHLIN BROS."

But the plaintiffs further allege that the said writing was not received as a substitute for the oral warranty which it alleges was made, and that the same was not read to plaintiffs and their co-purchasers and was not read by them, and that they had no knowledge of its contents until long afterward, and never assented to its provisions.

And the plaintiffs allege that the said writing was not delivered at or before the time said horse was bargained for, and that the said horse was purchased and the consideration therefor paid and the contract of sale was completed before the pretended delivery of the said writing to plaintiffs, or any of them.

And the plaintiffs allege that by reason of the foregoing facts they received nothing of any value for the consideration which they gave for said horse.

And the plaintiffs also allege that before the death of the stallion "Rotignon" and while he was in as good condition and as
116 sound as he was when he was received from defendant the defendant through T. D. McLaughlin refused to replace him with another stallion of the same price.

The defendants for answer and a first defense to the claim and cause of action of the plaintiffs denies each and every allegation made by the plaintiffs not specifically admitted, but admits that defendant is a co-partnership engaged in importing and selling stallions and admits that the plaintiffs exchanged the stallion "Chantilly" for the stallion "Rotignon" and that defendant delivered the writing hereinbefore set forth to plaintiffs.

For further answer and a second defense the defendant alleges that the only contract made by the defendants with plaintiffs in respect to the stallion "Rotignon" is the writing hereinbefore set out and

that these defendants have always been ready and willing to fully perform the same, but that the plaintiffs have always refused to perform the same on their part.

For further answer and a third defense to the claim and cause of action of plaintiffs the defendant alleges that the said stallion "Rotignon" was sold under a written contract, the same being the writing hereinbefore set out, of date February 25, 1903, and that the plaintiffs had full knowledge of the same and accepted and entered into the same at the time of the sale and delivery of the said horse, and fully assented to the same, and that the same is the only contract by which the defendant sold and the plaintiffs purchased the said horse.

2.

The foregoing instructions give you the issues which you are required to determine, and all other issues tendered by the pleadings are withdrawn from your consideration.

117

3.

The denial made by the defendant places on the plaintiffs the burden of proving the material facts denied by a preponderance of the evidence. A preponderance of the evidence does not mean simply the greater number of witnesses. It means that evidenc which is the more convincing to the mind, no matter whether it comes from the greater or lesser number of witnesses.

4.

The material facts denied by the defendant which the plaintiffs must prove by a preponderance of the evidence are the following, to-wit:

1. That the said stallion "Rotignon" was not sold under the written contract of date February 25, 1903.

2. That the defendant by its agent T. D. McLaughlin orally warranted that the stallion "Rotignon" was a reasonably sure foal getter, or would get with foal 60 per cent of the producing mares to which he was bred or that he was sound.

3. That the said stallion "Rotignon" was not a reasonably sure foal getter, or would not get 60 per cent of the producing mares to which he was bred with foal, or that he was not sound. In other words that there was a breach of the alleged oral warranty in some particular.

4. That by reason of the breach of the alleged warranty in some particular they have been damaged.

5.

It is the contention of the defendant among its other contentions that the stallion "Rotignon" was sold under the written contract of date February 13, 1903, and that the said written contract
118 by its terms limits the relief to which the plaintiffs are entitled, if the horse failed to get with foal 60 per cent of

the producing mares to which he was bred, to a return of the horse in exchange for another horse of the same value. It is the contention of the plaintiffs on this point that the horse was not sold under the said written contract and that they had no knowledge of its contents until long afterward and never assented to it. It is for you to say from the evidence what the truth of the matter is, and the first question submitted for you determination is whether or not the horse was sold under the said written contract.

6.

Whether or not the horse was sold under the said written contract depends upon what the agreement was between the plaintiffs and the defendant. If the minds of the plaintiffs and defendant met in an agreement that the horse should be sold by defendant and purchased by them under the written contract, the meeting of their minds upon the matter would make the written contract a part of the agreement between them, and it would then follow that the horse was sold under the written contract. But, if their minds did not so meet, it can not be said that the horse was sold under the written contract. But, in this connection you are told that if the plaintiffs understood from the negotiations that the horse was to be sold under the written contract of guaranty, or if they understood from the negotiations that the defendant was offering to sell the horse under a written contract of guaranty only and intended to put the contract of guaranty in written form, and if they also knowingly took and received the said written contract without objection, and accepted the horse therewith without objection, they must be held to have assented to the same. But if they did not understand from the negotiations that the horse was to be sold under a written contract of guaranty and did not understand from the negotiations
119 that the defendant was offering to sell the horse under a written contract of guaranty only, and did not knowingly take and receive the said written contract, they cannot be said to have assented to the same merely because the same was delivered to them and they accepted the horse.

7.

In determining the question of the agreement of the parties and the question whether the plaintiffs assented to the written contract you should take the agreement, understanding, or assent of any of the plaintiffs delegated or appointed by the plaintiffs to conduct the negotiations with the defendant, if any, to be the agreement, understanding, or assent of all the plaintiffs.

8.

It is the contention of the plaintiffs among their other contentions that the said written contract was not delivered at or before the time the horse was bargained for and purchased and the consideration paid and that it was delivered by defendant of its own volition without any agreement by plaintiffs that the horse should

be purchased under the written contract and thus delivered after the horse should be purchased *under the written contract and thus delivered after the horse had been purchased* and after their minds had fully met in an oral contract of purchase. It is the contention of the defendants as hereinbefore stated that the written contract was not delivered of their own volition after the horse was bargained for and purchased and the consideration paid but was delivered as a part of the agreement between them and that there was not a previous completed oral contract between them. It is for you to say from the evidence what the truth of the matter is. But
120 if you find that the plaintiff has shown by a preponderance of the evidence that the plaintiffs are right in their contention and that their contention is the truth of the matter you are told that it cannot be said that the horse was sold under the written contract, and in such case the written contract would be simply an additional unilateral agreement by defendant superadded for the benefit of the plaintiffs, but the horse would stand sold under the previous oral contract.

9.

If you find that the horse was sold under the written contract you should at once return a verdict for defendant for you are told that as a matter of law the relief to which the plaintiffs are entitled, if any, if the horse was sold under the written contract, is limited to a return of the horse and its exchange for another horse, and there is no evidence in the record sufficient to support a claim for damages for a breach of the written contract. But, if you find that the horse was not sold under the written contract but was sold under a previous oral contract, or that the written contract was not a part of the agreement for the exchange of horses, you will pass on and determine the other question herein submitted to you.

10.

It is the contention of the plaintiffs among their other contentions that the defendant by its agent T. D. McLaughlin orally warranted the stallion "Rotignon" to be a reasonably sure foal getter and to be able to get with foal 60 per cent of the producing mares to which he should be bred, and that he was sound. It is the contention of the defendant on this point that no such oral warranty was made. It is for you to say what the truth of the matter
121 is. Before you would be justified in finding that the said stallion was thus warranted you must first find that T. D. McLaughlin was the agent of the defendant and that he made an express warranty of the horse in the particulars mentioned in part and explicit words, intending thereby to warrant the horse, and that the plaintiffs understood the same to be a warranty and assented to the same as such, or that the said T. D. McLaughlin represented, stated or affirmed in some manner that the said stallion was a reasonably sure foal getter or would get with foal 60 per cent of the producing mares to which he was bred or was sound, and that he made the said representations, statements or affirmations with intent to effectuate the sale and with the intent thereby to assure the plaintiffs

that the horse possessed the said qualities, and with the intent to warrant the horse in the said particulars, and that the plaintiffs relied upon the said representations, statements or affirmations and were induced by them to make the purchase and understood the same to be a warranty. If you so first find, you should then find that the horse was orally warranted by defendant, in those particulars as to which you first find said warranty, or representations, statements or affirmations were made. But, if you do not so first find you should find that the defendant did not orally warrant the horse. And the burden is on the plaintiffs to prove all of said facts by a preponderance of the evidence.

11.

If you find that the said stallion was not sold under the written contract, and if you also find that he was orally warranted in some of the particulars in which plaintiffs allege he was thus warranted, and if you also find that there was a breach of the oral warranty, and if you also find that the plaintiffs were damaged thereby,
122 you should find for the plaintiffs and award them by your verdict such damages as they have shown by a preponderance of the evidence they have sustained.

12.

If you find for the plaintiffs you should allow the plaintiffs as damages the difference, if any, between the reasonable market value of the stallion "Rotignon" as he actually was at the time of the sale and his reasonable market value as it would have been if he had been such a horse as he was warranted to be, with interest, at 6 per cent per annum from the date of sale, no more and no less, not exceeding however the amount claimed, to-wit, $3000. with interest at 6 per cent per annum from February 25, 1903.

If, however, you fail to find that the stallion "Rotignon" was orally warranted in some of the particulars alleged, or if you fail to find that there was a breach of the oral warranty, if there was an oral warranty, or you fail to find that the plaintiffs have been damaged by a breach of the oral warranty, if there was one, your verdict should be for the defendant.

13.

I have not intended upon the trial of the case or in these instructions to express any opinion upon the matters in dispute between the parties to this action, and if I have seemed to do so it is a seeming only and not a real expression of opinion, and you should disregard it wholly and completely and reach your own conclusions from the evidence.

14.

I give you two forms of verdict. If you find for the plaintiffs you will use the first form, which is as follows:
123 "We, the jury in the above entitled action, do find for the plaintiffs, and fix the amount of their recovery at — Dollars."

And, you will insert in the blank space left for that purpose the amount upon which you agree.

If you find for the defendant you will use the second form, which is as follows:

"We, the jury in the above entitled action, do find for the defendant."

You will appoint one of your number foreman and when you have agreed upon your verdict your foreman will sign it and you will return into court with your verdict.

[illegible] to the said instructions and each and every instruction so given by the court severally, the defendants at the time duly excepted.

And thereupon the jury retired and afterwards the same day brought in their

Verdict

as follows:

We, the jury in the above entitled action, do find for the plaintiffs, and fix the amount of their recovery at Two Thousand Nine Hundred Dollars, with interest from Feb. 25, 1903 to Jan. 24, 1908 at 6 per cent per annum amounting to $855.02.

(Signed) C. P. LATHROP,
Foreman.

And thereupon it was agreed and ordered in open court that the defendants have thirty days in which to fil*l* a bill of exceptions and motion for new trial.

And thereupon the 27th day of January, A. D., 1908, the defendant filed in said cause.

Motion for New Trial

as follows:

Comes now the defendant and still objecting and excepting that this court has no jurisdiction herein, and insisting on its plea to the jurisdiction as hereinbefore filed, moves the court to set aside the verdict herein and to grant a new trial for the following reasons:

1. This court has no jurisdiction of this action.
2. The verdict herein is contrary to the evidence.
3. The verdict herein is contrary to law.
4. The verdict herein is contrary to the instructions of the court.
5. The verdict herein is the result of passion and prejudice.
6. The court erred in not directing the jury to return a verdict for the defendant and in not sustaining the motions therefor made by the defendant at the trial.
7. For errors in ruling upon the admission of testimony as set out in the official shorthand reporter's report of the trial of this cause excepted to by the defendant; all of which rulings and exceptions on the admission of testimony herein the defendant make- separate and several grounds for motion for new trial.
8. In giving the instructions given by the court to the jury, each

and all of which were excepted to at the time and are made separate and several grounds for this motion for new trial.

And thereupon on the 30th day of January, A. D., 1908, the court duly rendered and entered of record its

Order and Judgment

in said action, overruling the said motion for new trial, and rendering judgment in favor of the plaintiffs and against the
125–127 defendant for the sum of Thirty-seven Hundred Fifty five and 02/100 Dollars, and costs; to which at the time thereof the defendants duly excepted.

And thereupon on the 21st day of April, A. D., 1908 the defendants herein duly appealed to the Supreme Court of Iowa from the said judgment and order of said district court of Pocahontas County, Iowa, in said cause by serving

Notice of Appeal

in due and legal from upon Kelleher & O'Connor, the attorneys for the plaintiffs herein and upon P. M. Beers, Clerk of the District Court of Pocahontas County, Iowa.

And the same day the said John R. McLaughlin and James B. McLaughlin, duly appealed from the said judgment of the District Court of Pocahontas County, Iowa, in said cause to this court by serving

Notice of Appeal.

in due and legal form upon the said Kelleher & O'Connor, attorneys for the plaintiffs in said cause, and upon P. M. Beers, Clerk of the District Court of Pocahontas County, Iowa.

And the foregoing abstract correctly and fully contains and sets forth each and all of the process, pleadings, notices, motions, papers, filings, evidence, objections, motions, orders, rulings, instructions, verdict, judgment exceptions and all of the proceedings in the said cause, and the same is a full, true and complete abstract of the record in said cause.

E. A. & W. H. MORLING,
Attorneys for Appellant-.

* * * * * * *

128 In the Supreme Court of Iowa, March Term, A. D. 1909.

At Law.

L. A. HALLOWELL, N. BARRON, A. MOULTON (CORA B. MOULTON, as Administratrix of the Estate of A. Moulton, Deceased, Substituted for A. Moulton), S. Barron, N. Norton, and Lars Larson, Appellees,

vs.

McLAUGHLIN BROS., a Co-partnership, Appellant.

Appeal from Pocahontas District Court.

Hon. D. C. Coyle, Judge.

E. A. and W. H. Morling, and Wm. Hazlett, Attorneys for Appellant.

Kenyon, Kelleher & O'Connor and Frank A. Fairburn, Attorneys for Appellees.

Appellant's Amendment to Abstract.

Due and legal service of the within amendment to abstract accepted and copy thereof acknowledged this — day of ——, A. D., 1909.

—— ——,
—— ——,
Attorneys for Appellees.

129 The appellants add the following to their abstract of record herein:

The matter referred to in paragraph three of page two of the appellees' amendment to appellants' abstract is found only in the official shorthand reporter's notes and transcript on the first trial of this cause and pending the motion to direct a verdict as follows:

"Pending the motion to direct a verdict counsel for the plaintiffs by leave of court dismiss divisions one, two, three and four of this petition."

No other record or entry with reference to this was made.

The cautionary instruction referred to in the appellees' amendment to abstract is as follows:

"You are the sole judges of the credibility of the witnesses and of the weight to be given their evidence. In determining these you may take into consideration their appearance and demeanor while on the witness stand; their manner while testifying; their interest, if any, in the result of the trial; their relations to the parties, if any are shown; the reasonableness or unreasonableness of their several statements in the light of all the evidence; the opportunities of the witnesses to know the facts testified to by them; their knowledge of the subject matter and things about which they have testified, together

with all surrounding facts and circumstances as proven by the testimony.

Finally, gentlemen, give this case your earnest and careful consideration and return into court a verdict warranted by the evidence and these instructions."

E. A. MORLING,
Attorney for Appellants.

Cost of printing the foregoing amendment $1.00.
E. A. MORLING.

130 In the Supreme Court of Iowa, September Term, 1908.

At Law.

L. A. HALLOWELL, N. BARRON, A. MOULTON (CORA B. MOULTON, as Administratrix of the Estate of A. Moulton, Deceased, Substituted for A. Moulton), S. Barron, N. Norton, and Lars Larson, Appellees,

vs.

McLAUGHLIN BROS., a Co-partnership, Appellant.

Appeal from Pocahontas District Court.

Hon. D. F. Coyle, Judge.

E. A. and W. H. Morling and Wm. Hazlett, Attorneys for Appellant.

Kelleher & O'Connor and Frank Fairburn, Attorneys for the Appellees.

Appellees' Amendment to the Appellant's Abstract of Record.

Due and legal service of the within Amendment to Abstract of Record accepted this — day of September, A. D., 1908.

——— ———,
——— ———,
Attorneys for Appellant.

131 Come now the appellees and state and show the court that the abstract of record returned and filed herein, contains many inaccuracies and there are omissions of matters important and material to be shown of record. For the purpose of correcting the inaccuracies and supplying the omissions in appellant's abstract the appellees make and file the following amendments to said appellant's abstract and they amend said abstract in the particulars hereinafter set forth. To-wit:

1. By striking from the names of the appellants contained in the caption of said abstract the following, to-wit: "John R. McLaughlin and James B. McLaughlin sole members of the Co-partnership" because the said parties are not parties to the case, were never named as

parties thereto, and no suit has been brought or is maintained against them or either of them, nor are they mentioned in the caption or any of the pleadings filed by the plaintiffs and they were never named as defendants in the record in the lower court.

2. By adding immediately following the seventh line from the top of page two the following: The petition and each of the amendments filed by the plaintiffs made the single defendant, to-wit: "McLaughlin Bros. a co-partnership defendant."

3. By adding immediately following the sixth page of said abstract the following: The plaintiffs on to-wit the twentieth day of October, A. D., 1905, one of the days of the October term of the District Court of Pocahontas County, Iowa by leave of court dismissed each of the four divisions, of the original petition to-wit: Divisions, 1, 2, 3, 4, of said original petition.

4. By striking out the name of N. Barron in lines 9 and
132 10 from the top of page eight, being, to-wit, lines one and two in Exhibit "C" and inserting in place thereof the following: "N. Barnes."

5. By adding immediately following the said Exhibit "C" on the said page 8 of the abstract, the following: "All of the said Exhibit "C" is in print except the date and the names "L. A. Hallowell, N. Barnes, S. McKinney, A. Molton" and the words and numbers immediately following and including the number 29491, also the words, "another stallion named Chantilly," which are type written, and the words, "at any one of our established offices where any one of us reside" together with the signature "McLaughlin Bros.," are written with pen and ink.

6. By adding immediately following the twenty-fifth line of page ten of the abstract the following, to-wit: Said petition was signed "McLaughlin Bros. defendant by E. A. Morling attorney for Defendant McLaughlin Bros." The verification was by Thomas D. McLaughlin who declared on oath "that I am the agent of the above named defendant having charge of the above mentioned suit in their behalf."

7. By adding immediately following the sixteenth line from the top of page twenty-five the following: "There was a special prayer for judgment, following Division five, and Division six averred that the facts therein stated were alleged as a separate cause of action.

8. By inserting immediately following the word "plaintiffs" in the ninth line from the bottom of page thirty the following: "That plaintiffs had no knowledge of the contents of the same and."

9. By adding immediately after the twenty-first line from the top of page thirty-seven the following, to-wit: The first
133–159 trial of said case occurred at the October, 1905 Term of the Pocahontas District Court and resulted in a directed verdict in favor of the defendant. Judgment was duly rendered and entered in favor of the defendant against the plaintiffs for costs. The defendants did not appeal from any ruling made by the court therein. The plaintiffs appealed from the judgment rendered upon the verdict against them and upon said appeal the Supreme Court rendered its decision, reversing the judgment of the lower court and

remanding said cause for further proceedings to the Pocahontas District Court. A Writ of Procedendo was duly issued in said case. The opinion of the Supreme Court will be found in the 111th North Western Reporter, page four hundred twenty-eight.

10. Appellees deny the statement in Appellant's Abstract found on page thirty-seven that the cause came on for trial on the foregoing issue before the said court in as much as the four counts of the original were not a part of the issues.

* * * * * * *

160 59. The appellees further amend said abstract by inserting preceding the ruling of the court and following line eighteen on page one hundred seven the following:

161 "The COURT: What is the purpose of the offer Mr. Moring?

Mr. E. A. MORING: I want to show the filing of the papers that have been filed in this case, including these papers here. I will say to the Court it is my opinion, as I say, the question is raised by the records themselves, without offering them in evidence, but in order to be on the safe side I want to make the offer, that is all.

The COURT: I want to understand the history of this case, gentlemen, a little further:

At what time was this motion for substitution made with reference to the commencement of the action.

Mr. E. A. MORLING: Well, the petition was filed on December 16th, 1903, and an order for attachment, and attachment bond, and writ of attachment, were filed and issued that date. The first petition for removal was filed January 19th, 1904, and the second petition for removal January 16th, 1905, the order of remand being dated November 18th, 1904.

* * * * * * *

162 And the appellees further state that the said appellant's abstract does not set out all the instructions of the court and that a further cautionary instruction was given to the Jury in addition to those set out in the appellant's abstract of the record and for said reason, appellees deny that the appellant's abstract contains all of the instructions given; and the appellees deny the correctness of the appellant's abstract of the record in respect to all of the matters mentioned or referred to in the foregoing amendment and the appellees state that all of the matters set out in this amendment are matters of record in said cause.

KELLEHER & O'CONNOR,
FRANK FAIRBURN AND
Attorneys for the Appellees.

163 & 164 We hereby certify that the actual cost of printing the above abstract is $——.

KELLEHER & O'CONNOR AND
F. FAIRBURN.

Notice of Oral Argument.

Notice is hereby given that Counsel for the Appellees will argue this cause orally upon its final submission to the Supreme Court.

FRANK FAIRBURN AND
KELLEHER & O'CONNOR,
Attorneys for Appellees.

* * * * * * *

165 In the Supreme Court of Iowa, January Term, A. D., 1909.

At Law.

L. A. HALLOWELL, N. BARRON, A. MOULTON (CORA B. MOULTON, as Administratrix of the Estate of A. Moulton, Deceased, Substituted for A. Moulton), S. Barron, N. Norton, and Lars Larson, Appellees,

vs.

MCLAUGHLIN BROS., a Co-partnership, Appellant.

Appeal from Pocahontas District Court.

Hon. D. F. Coyle, Judge.

E. A. and W. H. Morling and William Hazlett, Attorneys for Appellant.

Frank A. Fairburn and Kenyon, Kelleher & O'Connor, Attorneys for Appellees.

Appellees' Second Amendment to Appellant's Abstract of Record, and Motion to Dismiss Appeal of John R. McLaughlin and James B. McLaughlin.

Due, legal service of the within second amendment to abstract of record and motion to dismiss appeal of John R. McLaughlin and James B. McLaughlin accepted and copy received this — day of ——, A. D. 1909.

——— ———,
Attorneys for John R. McLaughlin and James B. McLaughlin.

166 *Appellees' Second Amendment to Appellant's Abstract.*

Come now the appellees and amend the appellant's abstract of the record, by inserting immediately following the 20th line from the top of page 125 of the abstract, the following, to wit:

The only notices of appeal served by any persons in this cause were the notices set out as follows:

In the District Court of the State of Iowa in and for Pocahontas County.

L. A. HALLOWELL, N. BARRON, A. MOULTON (CORA B. MOULTON, as Administratrix of the Estate of A. Moulton, Deceased, Substituted for A. Moulton), S. Barron, N. Norton, and Lars Larson, Plaintiffs,

vs.

McLAUGHLIN BROS., Defendants.

Notice of Appeal.

To the plaintiffs hereinabove named or to Kelleher & O'Connor and Frank Fairburn, their attorneys, and to P. M. Beers, Clerk of the District Court of Pocahontas County, Iowa:

You are hereby notified that the defendants herein have appealed from the judgment of the District Court of the State of Iowa in and for Pocahontas County, rendered at the January Term, A. D., 1908 of said court, to wit, on the 30th day of January, A. D. 1908, in favor of the plaintiffs and against the defendants, in the above entitled action, to the Supreme Court of Iowa; and that said appeal will come on for hearing and determination at the next term thereof,
167 to be begun and held on the first Tuesday after the third Monday in September, A. D. 1908.

WM. HAZLETT,
E. A. & W. H. MORLING,
Attorneys for Defendants.

(Service of which was acknowledged on April 18, 1908.)

And the following:

In the District Court of the State of Iowa in and for Pocahontas County.

L. A. HALLOWELL, N. BARRON, A. MOULTON (CORA B. MOULTON, as Administratrix of the Estate of A. Moulton, Deceased, Substituted for A. Moulton), S. Barron, N. Norton, and Lars Larson, Plaintiffs,

vs.

McLAUGHLIN BROS., Defendants.

Notice of Appeal.

To the plaintiffs hereinabove named or to Kelleher & O'Connor and Frank Fairburn, their attorneys, and to P. M. Beers, Clerk of the District Court of Pocahontas County, Iowa:

You are hereby notified that John R. McLaughlin and James B. McLaughlin, sole members and partners in the firm of McLaughlin

Bros., defendants, herein, have appealed from the judgment of the District Court of Pocahontas County, Iowa, rendered in the above entitled action at the January Term, A. D., 1908 of said court, to wit, the 30th day of January, A. D., 1908, in favor of the plaintiffs and against the defendants to the Supreme Court of Iowa and that said appeal will come on for hearing and determination at the next
168 term thereof, to be begun and held on the first Tuesday after the third Monday in September, A. D., 1908.

WM. HAZLETT,
E. A. & W. H. MORLING,
Attorneys for Defendants.

Service of the foregoing notice was acknowledged in the following form:

Service of the foregoing notice is hereby acknowledged and copy thereof received this 18th day of April, A. D., 1908. This acknowledgment of service is not intended as a waiver of objections to the right of John R. McLaughlin and James B. McLaughlin to appeal, nor as an acquiescence to any such alleged right of appeal.

No other notices of appeal were served of any sort by John R. McLaughlin and James B. McLaughlin, and no notice of appeal from any ruling save the pretended appeal "from the judgment of the District Court of Pocahontas County, Iowa, rendered in the above entitled action at the January, A. D. 1908, Term of said court, to wit, the 30th day of January, A. D. 1908."

FRANK A. FAIRBURN,
KENYON, KELLEHER & O'CONNOR,
Attorneys for Appellees.

Motion to Dismiss.

Come now the appellees in the above entitled cause, and hereby move the court to dismiss the pretended and alleged appeal of John R. McLaughlin and James B. McLaughlin, for each of the reasons and upon each of the following grounds, to wit:

1. Because the pretended appeal is from the judgment alone and is not from the ruling upon the motion or application for
169 substitution of parties, nor from the order or action of the court in respect thereto; such ruling did not inhere in the judgment nor relate to any matter or issue submitted to the jury.

2. If an appeal was allowable at all to the said John R. and James B. McLaughlin, more than the statutory time elapsed after the ruling before any attempt was made by them to appeal therefrom.

3. The said John R. McLaughlin and James M. McLaughlin are not parties to the record and never were parties to the record, and have no such interest in the litigation as entitles them to be heard as individual appellants.

4. The said John R. McLaughlin and James B. McLaughlin are estopped from now prosecuting an appeal from the order and ruling

made by the court on said April 25, 1905, because of the lapse of time and because the said John R. McLaughlin and James B. McLaughlin notwithstanding this cause was subsequently tried in the District Court of Pocahontas County, Iowa, and judgment rendered and an appeal prosecuted to the Supreme Court of Iowa, never appeared therein nor presented at said time the contentions now presented, and they have waived any right of appeal if such right of appeal ever existed.

5. The appellees also object to the consideration upon this appeal of the contentions of McLaughlin Brothers in respect to the order and ruling upon the said motion and petition for substitution and petition and motion for removal, because of the lapse of time, and because and on account of all of the reasons set forth in the foregoing grounds of this motion.

6. The authorities in support of this motion are set forth
170 in the brief which will be filed upon the part of the appellees herein.

FRANK A. FAIRBURN AND
KENYON, KELLEHER & O'CONNOR,
Attorneys for Appellees.

We hereby certify that the actual cost of printing the foregoing amendment and motion is $—.

FRANK A. FAIRBURN AND
KENYON, KELLEHER & O'CONNOR,
Attorneys for Appellees.

171 Filed July 2nd, 1909.

In the Supreme Court of Iowa.

26309.

L. A. HALLOWELL et al.
v.
McLAUGHLIN BROTHERS, a Co-partnership, Appellants.

From Pochontas District Court.

D. F. Coyle, Judge.

Suit to Recover Damages for a Breach of Warranty of a Stock Horse. Verdict and Judgment for Plaintiffs. The Defendants Appeal.

E. A. & W. H. Morling, for appellants.
Frank A. Fairburn and Kenyon, Kelleher & O'Connor, for Appellees.

Per Curiam:

This is the second appeal in this case. The opinion on the first appeal is reported in the 136 Iowa, 279. That opinion is the law of

the case as to all questions therein discussed and determined, and it settles the plaintiff's right to recover on an oral warranty of the horse in question.

The instructions now before us are in accord with the former opinion and no reason is apparent for again discussing the law involved in the instructions given.

The evidence fully supports the verdict in this case and it should not be disturbed.

But one new question is here presented and that arises on
172 the following facts. This action was commenced in December 1903. It was transferred to the United States Circuit Court upon the defendants' application where it was remanded to the state court, because of want of jurisdiction of the Federal Court. In January, 1905, the defendants filed an application in the district court for the substitution of John R. and James *R.* McLaughlin as defendants. This was denied and since such denial both trial- have taken place and more than three years elapsed, and the defendants now appeal from the order denying substitution.

There was no right of substitution. The statute, Code, section 3468, expressly provides that a partnership may sue or be sued as a distinct legal entity.

Brumwell v. Stebbins, 83 Iowa, 425;
Ruthven v. Beckwith, 84 Iowa, 715;
Baxter v. Rollins, 110 Iowa, 310.

Under this statute the plaintiffs had the absolute right to sue the partnership alone or to join in such suit the individual members of the partnership. They chose the former course and they cannot be deprived of such right upon the application of the partnership or of the individual members thereof.

Allen v. Maddox, 40 Iowa, 124.
Ryerson v. Hendrie, 22 Iowa, 481.
Bollinger v. Tarbel, 16 Iowa, 493.
The Corporation of New Orleans v. Winter, et al. 1 Wheaton, 91, 4 L. Ed. 44.
Peninsular Iron Company v. Stone, 121 U. S. 631, 30 L. Ed. 1020.

The plaintiffs clearly had the right to sue McLaughlin Brothers, the partnership, alone. This they could not do in the Federal court, and the case was therefore nor removable.

Ex parte Wisner, 203 U. S. 409, 51 L. Ed. 264.

There is no merit in any of the appellants' contentions for error, and the judgment is affirmed.

Affirmed.

173 STATE OF IOWA, ss:

Supreme Court of Iowa.

Be it remembered, That on the 2nd day of July, 1909, the following proceedings, among others, were had in the Supreme Court of Iowa, to-wit:

No. 26309.

L. A. HALLOWELL et al.
vs.
McLAUGHLIN BROTHERS, Appellant.

Appeal from Pocahontas District Court.

In this cause, the Court being fully advised in the premises, file their written opinion affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby affirmed and that a writ of procedendo issue accordingly.

It is further considered by the Court that the appellant pay the costs of this appeal, taxed at $58.25 and that execution issue therefor.

174 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the Supreme Court of the State of Iowa, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Iowa, before you, being the highest court of law or equity in said state in which a decision could be had *on* said suit between L. A. Hallowell, N. Barron, A. Moulton (Cora B. Moulton, as Administratrix of the estate of A. Moulton, Deceased, substituted for A. Moulton), S. Barron, N. Norton and Lars Larson, plaintiffs and appellees, and McLaughlin Bros., a Co-partnership, (John R. McLaughlin and James B. McLaughlin sole members of the Copartnership), defendants and appellants, wherein was claimed by said defendants and appellants certain privileges and immunities and certain title and rights under the constitution and laws of the United States, and under the authority of the United States, and the decision was against the rights, title, privileges and immunities specifically set up and claimed under the aforesaid constitution and laws and authority aforesaid, a manifest error hath happened, to the great damage of the said defendants and appellants, McLaughlin Bros., a Co-partnership (John R. McLaughlin and James B. McLaughlin sole members of the co-partnership), plaintiffs in error, as by their complaint appears, we being willing that said error, if any hath been, should be duly corrected, and fully and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record

and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 13 day of August, next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

175 Witness the Honorable John Marshall Harlan, acting Chief Justice of the Supreme Court of the United States this 21st day of July, A. D. 1910.

[Seal U. S. Circuit Court, Southern District, Iowa.]

WM. C. McARTHUR,
Clerk of the United States Circuit Court in and for the Southern District of Iowa.

Writ allowed.

H. E. DEEMER,
Chief Justice of the Supreme Court of Iowa.

I hereby accept service of the above writ of error and acknowledge receipt of copy thereof this 23d day of July A. D. 1910.

KELLEHER & O'CONNOR AND
FRANK A. FAIRBURN,
Attorneys for L. A. Hallowell, N. Barron, A. Moulton (Cora B. Moulton, as Administratrix of the Estate of A. Moulton, Deceased, Substituted for A. Moulton), A. Barron, N. Norton and Lars Larson, Defendants in Error.

176 [Endorsed:] No. —. In the Supreme Court of Iowa. L. A. Hallowell, et al. vs. McLaughlin Bros., et al. Writ of Error. Supreme Court of Iowa. Filed Aug. 4, 1910. H. L. Bousquet, Clerk of the Supreme Court.

177 UNITED STATES OF AMERICA, *ss:*

The President of the United States to L. A. Hallowell, N. Barron, A. Moulton (Cora B. Moulton, as Administratrix of the Estate of A. Moulton, Deceased, Substituted for A. Moulton), S. Barron, N. Norton, and Lars Larson, Defendants in Error:

You are hereby cited and admonished to be and appear within thirty days after this date at a term of the Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Iowa, wherein McLaughlin Bros. a Co-partnership (John R. McLaughlin and James B. McLaughlin sole members of the co-partnership) are plaintiffs in error, to show cause, if any there by, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be cor-

rected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable H. E. Deemer, Chief Justice of the Supreme Court of Iowa this 18th day of July, A. D. 1910.

H. E. DEEMER,
Chief Justice of the Supreme Court of Iowa.

We hereby accept service of the above citation and acknowledge receipt of copy thereof this 23d day of July A. D. 1910.

KELLEHER & O'CONNOR AND
FRANK A. FAIRBURN,
Attorneys for Defendants in Error.

[Endorsed:] No. —. In the Supreme Court of Iowa. L. A. Hallowell, et al., vs. McLaughlin Bros. et al. Citation. Supreme Court of Iowa. Filed Aug. 4, 1910. H. L. Bousquet, Clerk Supreme Court.

178 STATE OF IOWA, *ss:*

26309.

McLAUGHLIN BROS., a Co-partnership, Plaintiff- in Error,
vs.
L. A. HALLOWELL et al., Defendant- in Error.

Pocahontas District Court.

I, H. L. Bousquet, Clerk of the Supreme Court of Iowa hereby certify that the above and foregoing pages contain the Citation and writ of error issued in above entitled case, also true and correct copies of all record entries and opinion of this Court, as true and correct as the same now appear of record among the files of this office, also copies of the abstract and all amended abstracts filed in this Court in said case.

In testimony whereof I have hereunto affixed my name and the seal of said Court. Done at Des Moines, Iowa, this 12th day of September, 1910.

[Seal of the Supreme Court of Iowa.]

H. L. BOSQUET,
Clerk Supreme Court, Iowa.

179 In the Supreme Court of the United States.

McLaughlin Brothers, John R. McLaughlin and James B. McLaughlin, Plaintiffs in Error,
vs.
L. A. Hallowell et al., Defendants in Error.

To the Defendants in Error Herein and to James H. McKenney, Clerk of the Supreme Court of the United States:

Please take notice:

That the plaintiffs in error hereby and herewith file a statement of errors on which they intend to rely herein, and they hereby designate the following as the parts of the record which they think necessary for the consideration thereof, and as the parts of the record to be printed herein, to-wit:

All of pages 1 to 37 to and including the words "plaintiffs' evidence" on said page 37 of the appellants' abstract of record in the Supreme Court of the State of Iowa including the endorsement of filing.

Also the last line of page 104, all of pages 105 and 106, and all of page 107 of the appellants' abstract of record down to the words "plaintiffs' rebuttal" on said page 107, and the other portions of said pages 37 to 107 inclusive constituting the bill of exceptions are considered by the plaintiffs in error immaterial to the writ of error herein.

The plaintiffs in error further designate all of page 112 of said appellants' abstract of record after the fifteenth line thereof and all of pages 113 to 125 inclusive except the last three lines of said page 125.

Also all of the following from the appellees' amendment to abstract of record herein, to-wit:

All of pages 1, 2, 3, 4 down to and including the nineteenth line of page 4. Also the last three lines of page 31, and all of page 32 down to and exclusive of paragraph numbered sixty, and all of page 33 after the nineteenth line thereof as the same is
180 shown in the printed appellees' amendment to the appellants' abstract of the record; also all of the appellees' second amendment to appellants' abstract of the record, and motion to dismiss the appeal of John R. McLaughlin and James B. McLaughlin, and all of the appellants' amendment to abstract.

The foregoing references are to the printed copies of the before mentioned abstracts of record and amendments thereto filed in the Supreme Court of Iowa, and constituting the record therein.

The plaintiffs in error further designate as in their judgment material and to be printed all of the record entries and opinion of the Court in the Supreme Court of Iowa, and the writ of error, bond given on writ of error, citation and all endorsements thereon and

proofs of service thereof, and all certificates and endorsements on or to the foregoing documents.

Dated October 10th, 1910.

CHARLES A. CLARK AND
E. A. MORLING,
Attorneys for Plaintiffs in Error.

Due and legal service of the foregoing designation and the attached assignments of error accepted this 12 day of October A. D., 1910.

KELLEHER & O'CONNOR,
Attorneys for Defendants in Error.

181 In the Supreme Court of the United States.

McLAUGHLIN BROTHERS, JOHN R. McLAUGHLIN and JAMES B. McLAUGHLIN, Plaintiffs in Error,

vs.

L. A. HALLOWELL and Others, Defendants in Error.

Assignments of Error.

And the plaintiffs in error, and each of them severally say that there is manifest error on the face of the record in this, to-wit:

First. The Supreme Court of Iowa erred in holding that under the statute of Iowa (Code, Section 3468,) which provides that actions may be brought by or against a partnership as such or against all or either of the individual members thereof, or against it and all or any of the members thereof, a suit brought by a citizen of Iowa in the District Court of Iowa against a partnership not a citizen of Iowa and composed entirely of citizens of another state can not be removed to the Circuit Court of the United States if the defendants are sued in their partnership name although the action would be otherwise removeable.

Second. The Supreme Court of Iowa erred in not holding and determining that the provisions of Section 3468 of the Code of Iowa are limited and controlled by the provisions of the Constitution and statutes of the United States conferring upon the courts of the United States jurisdiction of controversies between citizens of different states.

Third. The Supreme Court of Iowa erred in affirming and sustaining the order of the District Court of the State of Iowa in and for Pocahontas County rendered on the twenty-fifth day of April, 1905 and entered on the first day of May, 1905 as follows:

"1. That the exceptions of the plaintiff to the motion for substitution of John R. McLaughlin and James B. McLaughlin are sustained and the motion to substitute the said John R. McLaughlin and James B. McLaughlin made by the defendant and said John R. McLaughlin and James B. McLaughlin is denied and overruled.

"2. That the exceptions filed by the plaintiffs to the motion and application of McLaughlin Brothers and John R. McLaughlin and James B. McLaughlin to permit the said John R. McLaughlin and James B. McLaughlin to join in the defense of said cause are sustained, and the motion and application of the said McLaughlin Brothers and the said John R. McLaughlin and James B. McLaughlin as parties defendant herein is overruled and denied.

"3. The petition for removal of the case herein to the United States Circuit Court is denied, and the exceptions to said petition and application for removal filed by the plaintiffs is sustained."

Fourth. The Supreme Court erred in affirming the order of the District Court of the State of Iowa in and for Pocahontas County, Iowa denying and overruling the motion of John R. McLaughlin and James B. McLaughlin for substitution, wherein the said John R. McLaughlin and James B. McLaughlin moved the court as follows:

"1. For an order herein substituting these defendants in their individual names as sole parties defendant herein, and permitting them to appear herein and answer and defend in their individual names.

"2. If the foregoing is overruled, then, that an order be made joining the said John R. McLaughlin and James B. McLaughlin as parties defendant herein, in their individual names and permitting them to appear, answer, and defend in their individual names."

Fifth. The Supreme Court of Iowa erred in affirming the order of the District Court in and for Pocahontas County denying and overruling the motion of McLaughlin Brothers or application for substitution of parties wherein they moved the court as follows:

1. That the said John R. McLaughlin and James B. McLaughlin be substituted in place of the defendants, McLaughlin Brothers, as sole parties defendant herein, and that they be permitted to appear, answer, and defend in their individual names.

2. If the foregoing is overruled, then that the said John R. McLaughlin and James B. McLaughlin be joined as parties defendant herein and be permitted to appear, answer and defend—in their individual names.

Sixth. The Supreme Court of Iowa erred in affirming the action and order of the District Court of the State of Iowa in and for
183 Pocahontas County wherein and whereby said courts denied and overruled the petition of McLaughlin Brothers, John R. McLaughlin and James B. McLaughlin to remove this action to the Circuit Court of the United States in and for the Northern District of Iowa and to proceed no further therein filed January 16, 1905, and the court erred in denying and overruling the said petition as to the said John R. McLaughlin and James B. McLaughlin, and as to the said McLaughlin Brothers.

CHARLES A. CLARK AND
E. A. MORLING,
Attorneys for Plaintiffs in Error.

[Endorsed:] 732/22353.

184 [Endorsed:] File No. 22,353. Supreme Court U. S. October Term, 190-. Term No. 732. McLaughlin Bros. et al., pl'ffs in Error, vs. L. A. Hallowell. Designation by plaintiffs in error of parts of record to be printed and assignment of errors and proof of service of same. Filed October 20, 1910.

Endorsed on cover: File No. 22,353. Iowa Supreme Court. Term No. 732. McLaughlin Bros., a copartnership (John R. McLaughlin and James B. McLaughlin, sole members of the copartnership), plaintiffs in error, vs. L. A. Hallowell et al. Filed October 13th, 1910. File No. 22,353.

INDEX.

INDEX, BRIEF AND REPLY.

	Page of Brief	Page of Reply
Answer and Plea	5	
Appearance	3	10
Appearance, Petition for Removal, Notice	20	12
Approval of 2d Removal Bond		7
Assignments of Error	10-12	
Attachment is Auxiliary		4
Attachment Notice, Return Necessary		4, 5, 6, 11
Bond for Removal Approved		8
Commencement of Action is by Notice and Return	20-21	4, 5, 11
Declaration (petition)	2	
Declaration (amendment)	5	8
Estoppel of Defendants in Error		7, 9, 10, 11
"Filed" Sufficiently Shows "Presented"		9, 12-18
Form, Matters if Disregarded	14	9, 17
Jurisdiction Not Dependent on Forms	14-15	9, 17
Motions for New Trial	6	10
Objections to Removal	4	7
Objections to Substitution	4	7
Order Denying Removal	3	8
Opinion Iowa Supreme Court	7	
Partnership Suable in Federal Court	12, 13	
Partnership Suable in Federal Court	14, 16	
Partnership, Questions as to, Waived	15	
Petition for Removal "Presented"		9, 12-18
Plea to Jurisdiction	5	
Plea Not Due When Removal Asked	20-21	4, 6
"Presentment" Sufficiently Shown		9, 14-18
"Presentment", Questions as to, Waived		9, 10
Process and Return Necessary		4, 5, 10, 11
Record Must be Accepted		3
Remand on First Petition, Reason for	21	
Remand on Second Petition, Reason for	21	
Removal Proceedings Not Barred	21, 22	10, 11, 14-18
Removal, Propriety of, Is Question of Federal Law	16	
Renewal of Petition for Removal, Right of	21	10, 15
Repleading in Federal Court	14	

State Statute Cannot Embarrass Right to Remove	13	12
Statutes of Iowa	8-10	1, 2
Substitution of Partners, Right to	15	9, 12
Substitution, Objections to	4	7
Substitution, Propriety of Motion	15	9, 12
Substitution, Motion for, Not a Waiver of Right to Remove		10, 11, 15
Venue, Objections to, Waived	16, 19	
Venue, Sufficiently Shown	17, 19	
Waiver of Objection that Removal Petition Not Presented		9, 10

Alphabetical List of Cases Cited.

	Page of Brief	Page of Reply
Abell vs. Cross, 17 Ia. 171		6
Albright-Prior Co. vs. Pacific Selling Co., 126 Ga. 498, 55 S. E. 251		5
Ames vs. Chirurg, 152 Ia. 278		4
Ayers vs. Watson, 113 U. S. 594		17
Balt. & O. R. Co. vs. Joy, 173 U. S. 226	12-13	
Barney vs. Lathan, 103 U. S. 205	14	
Barrow vs. Burnside, 121 U. S. 186	13	
Barton vs. Smith, 7 Ia. 85		11
Beam vs. Barney, 10 Ia. 498		11
Bluegrass Co. vs. Wardman, 103 Tenn. 179	15	
Bowden vs. T. A. Gillespie Co., 75 N. J. L. 296		5
Breedlove vs. Nicolet, 7 Pet. 413	12, 13, 15	
Bushnell vs. Park, 46 Fed. 209	14	
Callaway vs. Doug. Coll., 99 Ga. 623		5
Chapman vs. Barney, 129 U. S. 677	14, 15	
Chaffee vs. Boston Belting Co., 22 How. 217		3
Ches. & O. R. Co. vs. McCabe, 213 U. S. 207	16, 21, 22	
Clark vs. Beier, 139 U. S. 96	13	
Clark vs. Wells, 203 U. S. 164	16, 20	
Col. Mid. etc. vs. Jones, 29 Fed. 193	13	
Com. Bank vs. Slocomb, 14 Pet. 60	14	
Covington, etc. Co. vs. Sandford, 164 U. S. 578		13
Dancel vs. Goodyear, etc., 106 Fed. 551		15
Davis vs. Wakelee, 156 U. S. 680		12
Edmund vs. Ill. Cent. R. Co., 80 Fed. 78	12-13	
Empire Co. vs. Buckley, 137 Ia. 7		6
Farmers Bank vs. Wright, 158 Fed. 841	12-13	
Fritzlen vs. Boatmen's Bank, 212 N. S. 364	21	11

Gilman vs. Cosgrove, 22 Cal. 356	15	
Glover vs. Newsome, 132 Ga. 797		3
Goldey vs. Morning News, 156 U. S. 518	13	
Great So. vs. Jones, 177 U. S. 449	14	
Greeman vs. Butler, 39 Fed. 1	21	
Greensboro vs. Southern Co., 168 Fed. 880	12-13	
Haywarden vs. Hessler, 131 Ia. 691		11
Hess vs. Reynolds, 113 U. S. 73	13	
H. L. Bruitt vs. Austin Drainage Co. 174 Fed. 668	14	
Hodgson vs. Tibbetts, 16 Ia. 97		4
Hoitt vs. Skinner, 99 Ia. 360		6
Home Ins. Co. vs. Morse, 20 Wall. 445	13	
Hudgins vs. Kemp, 18 How. 530		3
Ingersoll vs. Coran, 211 U. S. 335	19	10
Jewish Col. Co. vs. Solomon, 125 Fed. 994	14	
Jones vs. Andrews, 10 Wall. 327	17, 19	
Keller vs. Harrison, 139 Ia. 383	20	
Kinney vs. Columbia S. & L. A., 191 U. S. 249	17, 18, 19	
Kreigh vs. Westinghouse, 214 U. S. 249	16,19	
Lambson vs. Falls, 6 Ind. 309		9
Littlejohn vs. Bullis, 136 Ia. 150	20	
Liverpool vs. Cigar, 14 Fed. 615	15	
Louisville etc. Co. vs. Letson, 2 How. 497	14	
McDonald vs. Moore, 65 Ia. 171		5
Madisonville Tr. Co. vs. St. Barnard Co., 196 U. S. 239	13	9, 14
Marquette Co. vs. Marcott, 41 Mich. 433		3
Marshall vs. Balt. etc., 16 How. 314	13, 14, 15	
Martin vs. Balt. etc. Co., 151 U. S. 673	13	
Mason City etc. Co. vs. Boynton, 204 U. S. 570	13	
Martin vs. Meyer, 45 Fed. 435	15	
Mech. Appl. Co. vs. Castleton, 215 U. S. 437	20	
Miller vs. Corbin, 46 Ia. 150		6
Moore, In re, 209 U. S. 490	16, 19	
Nederland L. I. Co. vs. Howe, 84 Fed. 278	12-13	
News Print Co. vs. Brunswick Pub. Co., 113 Ga. 160		5
Northern Pac. R. Co. vs. Paine, 119 U. S. 561	14	
Ohio & M. R. Co. vs. McCarthy, 96 U. S. 258		9
Palmer vs. Spandenberg, (Tex.) 108 S. W. 477		3
Petri vs. F. E. Creelman Co., 199 U. S. 487	20	
Phelps vs. Oaks, 117 U. S. 236	14	

Powers vs. Ches. etc. Co., 169 U. S. 92	18, 21, 22	9, 11, 17
Pritchard vs. Norton, 106 U. S. 124	12-13	
Raiya Market Co. vs. Armour, 102 Fed. 530	15	
Remington vs. C. P. R. Co., 198 U. S. 95	14, 16	9, 11, 14
Richmond vs. Irons, 121 U. S. 27	14	
Robertson vs. Cease, 97 U. S. 646	18	
Rock vs. Singmaster, 62 Ia. 511		4, 5
Rucker vs. Bolles, 80 Fed. 504	17	
Saunders vs. Adams Exp., (N. J.) 57 Atl. 899	15	
Schloss vs. White, 16 Cal. 65		6
So. Pac. R. Co. vs. Denton, 146 U. S. 207	13	
So. Pac. R. Co. vs. Stewart, (Ga.) 13 S. E. 824	21	
State vs. Cass Co., 60 Neb. 566		9
State vs. Ludwig, (Wis.) 132 N. W. 130		3
Stewart vs. Dunham, 115 U. S. 61	14	
Sun. P. & P. Co. vs. Edwards, 194 U S. 377	17	
Tex. & P. R. Co. vs. Eastin, 214 U. S. 153	16, 22	
Tex. & P. R. Co. vs. Hood, (Tex.) 125 S. W. 982		3
Tomson vs. Ia. S. T. M. etc. Co., (Neb.) 110 N. W. 997	18	
Tortat vs. Hardin Co., 111 Fed. 426	21	
Tunis vs. Withrow, 10 Ia. 305		6
U S. Bank vs. Deveaux, 5 Crasch. 61	14	
Wabash W. R. Co. vs. Brow, 164 U. S. 271	20	12
Wade vs Wade, 81 Vt. 275		4, 11
Western L. & S. Co. vs. Butte etc., 210 U. S. 368	16, 19	
Wilkinson vs. Chilson, 71 Wis. 131		11
Williams vs. Williams, 61 Ia. 612		11

(22,353)

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 149.

McLAUGHLIN BROS., A COPARTNERSHIP, (JOHN R. McLAUGHLIN AND JAMES B. McLAUGHLIN, SOLE MEMBERS OF THE COPARTNERSHIP), PLAINTIFFS IN ERROR,

vs.

L. A. HALLOWELL, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

STATUTES OF IOWA.

The following sections of the Code of Iowa seem to be required by the argument for the defendants in error. They are taken from the Code of 1897.

Section 3519 provides: "If served personally, the return must state the time, manner and place of making the service, and that a copy was delivered to defendant, or offered to be delivered. If made by leaving a copy with the family, it must state at whose house the same was left, and that it was the usual place of residence of the defendant, and the township, town or city in which the house was situated, the name of the person with whom the same was left, or a sufficient reason for omitting to do so, and that such person

was over fourteen years of age and was a member of the family."

Section 3534 provides: "Service may be made by publication, when an affidavit is filed that personal service can not be made on the defendant within this state, in either of the following cases: * * * 5. In actions brought against a non-resident of this state, or a foreign corporation, having in the state property or debts owing to such defendant, sought to be taken by any of the provisional remedies, or to be appropriated in any way."

Section 3536: "When the foregoing provisions have been complied with, the defendant so notified shall be required to appear as if personally served on the day of the last publication within the county in which the petition is filed, proof thereof being made by the affidavit of the publisher or his foreman, and filed before default is taken."

Section 3789 provides: "Where no appearance is made, default shall not be entered until the court determines from an inspection of the record that notice has been given as required by this code."

Section 3876: "The plaintiff in a civil action may cause the property of the defendant not exempt from execution to be attached at the commencement or during the progress of the proceedings, by pursuing the course hereinafter prescribed."

Section 3877: "If it be subsequent to the commencement of the action, a separate petition must be filed, and in all cases the proceedings relative to the attachment are to be deemed independent of the ordinary proceedings and only auxiliary thereto."

Section 3947 of the Code, as amended in 1898, (see Supplement, 1907), is as follows: "Judgment against the garnishee shall not be entered until the principal defendant shall have had ten days' notice of the garnishment proceedings to be served in the same manner as original notices."

PROPOSITIONS AND BRIEF IN REPLY.

In the brief for plaintiffs in error, we noticed all the questions on the right of removal that have heretofore been suggested in this case. The main contention of the defendants in error heretofore, and the one which was ruled upon by the Supreme Court of Iowa, was that an action could not be maintained against the partnership in its partnership name in the Federal Court, and therefore there was no right of removal. This proposition in this court is abandoned and other objections to the right of removal now raised for the first time seem to demand reply.

We may say that the right of a citizen of another state to have his cause tried in a court in which the jury is not composed of the neighbors and friends of his opponent, is a right of such value as to be guaranteed by the constitution of the United States and ought not to be adjudged to be forfeited on mere casuistry, innuendo and technicality.

First.

The record must be taken as a verity. The judgment cannot be overturned or sustained upon the assertions of counsel as to what did or did not occur, not shown by the record.

Hudgins vs. Kemp, 18 Howard, 530.

Chaffee vs. Boston Belting Co., 22 Howard, 217, 222.

Texas & P. R. Co. vs. Hood, (Texas) 125 S. W. 982.

Glover vs. Newsom, 132 Ga. 797; 65 S. E. 64.

Marquette, etc., Co. vs. Marcott, 41 Mich. 433, 436.

State vs. Ludwig, (Wis.) 132 N. W. 130.

Palmer vs. Spandenberg, (Texas) 108 S. W. 477.

3 Cyc. 152.

Second.

In Iowa the attachment proceedings are independent of the ordinary proceedings and only auxiliary thereto.

Code, Section 3877, *Supra.*

Ames vs. Chirurg, 152 Ia. 278, 285.

Original notice in the main suit is required as in other cases.

Code, Section 3534, *Supra.*

Hodgson vs. Tibbets, 16 Ia. 97, and cases found under points *fourth* and *seventh, post.*

Besides this, the principal defendant must have ten days' notice of the garnishment proceedings, to be served in the same manner as original notice.

Code, Section 3947, *Supra.*

The return of service or proof of publication must show that the defendant has been properly notified, and default can not be entered until the court determines from an inspection of the record that notice has been given as required by the Code.

Sections 3519, 3534, 3536, 3789, *Supra.*

Rock vs. Singmaster, 62 Ia. 511.

Where the attachment is merely ancillary to the main action, the levy gives no jurisdiction to render judgment without service of the original notice in the main action.

Authorities above and *post, fourth, seventh.*

4 Cyc. 813.

Wade vs. Wade, 81 Vt. 275; 69 Atl. 826.

Third.

When the last petition for removal was filed, the time to plead or answer had not arrived.

"A legal return of service is essential, in a civil action, to give the court jurisdiction of the person of the defendant, and until such return has been made the defendant is not required to plead to the merits."

Callaway vs. Douglasville College, 99 Ga. 623; 25 S. E. 850.

Bowden vs. T. A. Gillispie Co., 75 N. J. Law, 296; 68 Atl. 238.

News Printing Co. vs. Brunswick Publishing Co., 113 Ga. 160; 38 S. E. 333.

Albright-Prior Co. vs. Pacific Selling Co., (Ga.) 55 S. E. 251.

Rock vs. Singmaster, 62 Ia. 511.

Process for appearance must be returned at the same term or the next term, and if not so returned the defendant may treat the action as abandoned.

Bowden vs. T. A. Gillispie, 75 N. J. Law, 296; 68 Atl. 238.

"When an attachment has been issued against a non-resident and executed by service of summons of garnishment, the court is without jurisdiction to render a judgment on the attachment until it appears from the answer of the garnishee that the property or effects of, or a debt due the defendant, within the jurisdiction, have been seized under the garnishment."

Albright-Prior Co. vs. Pacific Selling Co., 126 Ga. 498; 55 S. E. 251.

Rock vs. Singmaster, 62 Ia. 511.

McDonald vs. Moore, 65 Ia. 171.

Defendants in error asserted in the trial court (13) that the plaintiffs in error were required to plead at the January or March term, 1904, and so were apprised of the necessity of making good such assertion. But they have wholly failed to show any reason or any record to sustain their claim and are not in position to ask the court to disregard the record and accept a statement which they are wholly unable to maintain.

Fourth.

The filings in this case are all before the court. (24) No original notice is shown. Furthermore no claim was ever made that any original notice was ever served or attempted to be served. No effort was made in any form in response to the petition for removal to show that the time to plead had elapsed when the petition for removal was filed. It is therefore apparent from the record that a plea filed the next day after appearance, January 17, 1905, would have been in time. No default for not making such plea could have been entered. The petition for removal was therefore in time.

Statutes and cases, *Supra,* and page 8 original argument.

Hoitt vs. Skinner, 99 Ia. 360.

Tunis vs. Withrow, 10 Ia. 305.

Abell vs. Cross, 17 Ia. 171.

Empire, etc., Co. vs. Beachley, 137 Ia. 7.

Miller vs. Corbin, 46 Ia. 150.

Schloss vs. White, 16 Cal. 65.

Wilkinson vs. Chillson, (Wis.) 36 N. W. 836; 71 Wis. 131.

Fifth.

The record shows that the plaintiffs in error appeared on the first day of the regular January term, 1905; that at the time of appearance they filed their motions for substitution which showed that the action was a removable one, and that the only effect of maintaining the action in the partnership name was to prevent a removal. They therefore asked for substitution or joinder of the individual partners. (8, 9) At the same time they filed their petition for removal, and at the same time filed their bond for removal. This bond was approved at the same time, January 16, 1905. (11) The defendants in error on January 24, 1905, filed objections to the motion for substitution, one of the grounds of which was: "The said John R. McLaughlin and James B. McLaughlin are not entitled to any of the rights claimed in said motion and have no legal right to have a cause of action brought against a copartnership tried by the Circuit Court of the United States." (12) On March 20, 1905, they filed

* "5. The record in this cause affirmatively shows that this suit was brought and was pending in the District Court of the State of Iowa in and for Pocahontas County at the January 1904, term of said court, that the said suit was brought against McLaughlin Brothers, a co-partnership, as sole defendants and that said McLaughlin Brothers appeared at said January, 1904, Term of said court; that the said defendants were required to answer at said term of court and by virtue of process and appearance in any event not later than at the March Term, 1904, of said court, that three several terms, and more than nine months have elapsed since the time when, by the statute of Iowa and the rules of practice in this court, the said defendants were required to appear and answer in said cause."

Motions, pleas or answers are made in Iowa by filing at the term.

nine months "have elapsed," (March, May, September terms, nine months, March to December, 1904,) can only mean that the petition for removal and bond were properly before the court on January 16, 1905.

The order made by the Court April 25, 1905, in vacation, recites: "This matter having come on for hearing in chambers upon the agreement of both plaintiff and defendant." No action was taken by the court and none was demanded by the defendants in error, and no proceedings were had from the time of the filing of the petition for removal until after the entry of the order denying the same, but on the contrary the whole matter, as recited in the order, was left to be heard at chambers. After the denial of the removal, defendants in error filed amendment setting up different causes of action, (14) and the plaintiffs in error continued to insist upon their right to removal.

The record shows that the sole members of the firm of McLaughlin Brothers were John R. McLaughlin and James B. McLaughlin. The petition for removal is filed in behalf of all of the defendants. The prayer of the petition is: "These defendants do make and file herewith bond with good and sufficient sureties as by the statutes of Congress to that end enacted and respectfully petition the court to accept this their said petition," etc. This was filed "by the said defendants and John R. McLaughlin and James B. McLaughlin." (Record 9.) The principals in the bond are John R. McLaughlin and James B. McLaughlin and McLaughlin Brothers. (10) The bond was approved January 16, 1905. This court in removal cases, 100 U. S. 457, 473, said: "And to bar the right of removal, it must appear that the trial had actually begun and was in progress in the orderly course of proceedings when the application was made." On this record the correlative should be applied in the present suit, i. e. that it must appear that the time to plead had actually

elapsed. A filing when the court is in open session is a presenting to the court.

2 Burrill's Law Dictionary, page 489.
Lambson vs. Falls, 6 Ind. 309, 310.
Anderson, Law Dict. 459.

This court has frequently used the word "filed," holding that if the petition is "filed" in time, the cause is in law removed.

Madisonville Traction Co. vs. St. Barnard Mining Co., 196 U. S. 239, 244.
Remington vs. Central Pacific R. Co., 198 U. S. 95, 98.
Powers vs. Chesapeake, 169 U. S. 92, 98.
See quotations, post.

"But the time of filing petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice Bradley, 'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel."

Powers vs. Chesapeake, etc., Co., 169 U. S. 92, 98, and cases cited.

The objection was that the petition for removal was filed too late. It is too late now for the defendants in error to attempt to mend their hold by claiming that the petition was not presented.

Ohio & M. Railway Co. vs. McCarthy, 96 U. S. 258, 267.
State vs. Cass Co., 60 Neb. 566; 83 N. W. 733.

The proceedings up to this date have assumed that there was a presenting, and have assumed that the petition was

presented, and that the date of filing was the date of presenting. The record shows that this was the case and assumed to be the case. The objection that it was not presented can not be made now.

Ingersol vs. Coran, 211 U. S. 335, 355, 356, and cases cited under points 9, 10 and 11, page 19 original brief.

Sixth.

The defendants in error filed petition for removal on January 19, 1904, (6). Again on January 16, 1905, (9), they raised the question of their right to removal in application for substitution. (8) They set up this right by way of plea to the jurisdiction in connection with their answer. (20) They offered in evidence the appearance docket showing all the filings (24) and offered in evidence their proceedings for removal. (25) They insisted upon the question in motion to direct verdict (25) and in their motion for new trial (32). The effect of the allegation in the answer is that by the attachment or garnishment the plaintiffs in error were compelled to come into court to rescue their property. (23). The plaintiffs in error have at no time and at no place and in no manner claimed or admitted that the District Court of Iowa obtained jurisdiction over the persons or property of these plaintiffs in error, until they voluntarily appeared on January 16, 1905, and filed their motion for substitution which, it may be conceded was filed for the purpose of avoiding any technical or formal question of the right of the partnership to a standing in the firm name in the United States court.

The only reason for the remand of this cause after the first petition for removal was filed was: "This court not having jurisdiction by reason of lack of evidence in the transcript

filed herein that said defendant had been served with notice of said proceedings." The defendants in error took advantage and accepted the benefit of the absence of original notice. When the second petition for removal was filed, the appearance and motion for substitution made a different record and presented a situation entirely different from that presented to the Circuit Court. The time to plead had not yet arrived and the second petition should have been granted.

Fritzlen vs. Boatmen's Bank, 212 U. S. 364, 372.
Powers vs. Chesapeake, etc., Co., 169 U. S. 101.
Remington vs. Central Pac. R. Co., 198 U. S. 95, 98.

Seventh.

It is manifest that mere knowledge of the filing of the petition and of the garnishment of the express company or attachment of the property of the plaintiffs in error did not compel them to go into court or to plead to the petition.

Wade vs. Wade, 81 Vt. 275; 69 Atl. 826.

No judgment could be had against the garnishee. Though the judgment against the defendants need not be a personal judgment it must be upon notice as in other actions.

Haywarden vs. Hessler, 131 Ia. 691.
Barton vs. Smith, 7 Ia. 85.
Williams vs. Williams, 61 Ia. 612.
Beam vs. Barney, 10 Ia. 498.
4 Cyc. 813.

Eighth.

The defendants in error on the first removal filed a motion for a remand which was sustained. They are now es-

topped to assert that the action should have been dismissed instead of remanded.

Davis vs. Wakelee, 156 U. S. 680, 689.

Ninth.

It is absurd to urge that the plaintiffs in error never supposed that the cause was remanded to the state court for failure of the transcript to show notice. The plaintiffs in error offered in evidence the certified copy of the order to remand. (25) They offered in evidence the appearance docket for the purpose of showing that no notice had been served. (24) Because the ground of the remand was that there was no notice and for no other reason, they appeared in the action, (8). They knew the defendants in error were relying upon the supposed inability of the Federal Court to entertain an action against a partnership, which has been the constant claim of the defendants in error in the lower courts, and which plaintiffs in error sought to obviate. The Federal Court did not pass upon this question on the first removal. (6). The plaintiffs in error sought by motion for substitution in accordance with the suggestion in *Ralya Market Co. vs. Armour*, 102 Fed. 530, to eliminate this question. It is not competent for the state to interfere with the right to removal by affixing to the exercise of such right the penalty of submission to the state court, and hence, the filing of the first petition for removal, which was no more than an invoking of the rights and privileges of plaintiffs in error under the Federal constitution and statutes, cannot be penalized by the state by denouncing it with the consequences of an appearance.

Cases in Brief, 13, *first*, 16, *sixth*.

Wabash Western Ry. Co. vs. Brow, 164 U. S. 271.

Tenth.

The question of the sufficiency of allegations to present the issue is a Federal question upon which the Supreme Court of the United States is not concluded by the finding of the state court.

Covington, etc., Co. vs. Sandford, 164 U. S. 578, 595.

Eleventh.

The very question raised in the state court and insisted upon throughout and ruled against by the State Supreme Court was the right to removal. The point urged by the defendants in error from the start and presented to the State Supreme court that "they had the right to sue McLaughlin Brothers, the partnership alone. This they could not do in the Federal court and the case was therefore not removable."—(Record 42) is the very Federal question that the defendants in error have at all times presented and relied upon and procured to be ruled in their favor in the Supreme court of Iowa. This question, the one which they have hitherto always insisted upon, is the one which they now, apparently by not arguing, wholly surrender.

Further on the claim that the State Supreme Court ruled only on the right of substitution: The cause was remanded because of lack of evidence in the transcript that defendants had been served with notice. But to avoid this objection at the same time the petition for removal was filed, they appeared, (Record 8, 9.) To avoid the objection that the partnership could not remove, the applications for substitution were filed at the same time the petition for removal and bond were filed, all of which were by and in behalf of the defendants. (9, 10). The object of all these proceed-

ings, as shown on their face, and as recognized by the defendants in error, (record 12, L. 5) was to procure a removal and avoid the technical objections to the right of the plaintiffs in error thereto. The petition for removal was denied by the trial court, (13 Par. 3 of order). The petition for removal was presented and the right thereto insisted upon and explicitly overruled in both the lower courts.

Twelfth.

Defendants in error are entitled to no advantage by urging at this late day that the word "filed" is used in the proceedings and not the word "presented." They used the same word, insisting that the petition was "filed" too late and never claimed that it was not presented when filed. The word is frequently used by this court.

We quote from the opinion of this court as follows:

In *Madisonville Traction Co. vs. St. Bernard Mining Company,* 196 U. S. 239, 244, it is said: "If a case be a removable one, that is, if the suit, in its nature, be one of which the circuit court could rightfully take jurisdiction, then *upon the filing of a petition* for removal, in due time, with a sufficient bond, the case is, in law, removed, and the state court in which it is pending will lose jurisdiction to proceed further, and all subsequent proceedings in that court will be void. * * * After the presentation of a sufficient petition and bond to the state court in a removable case, it is competent for the circuit court, by a proceeding ancillary in its nature" to restrain further steps in the state court.

Nor is there any merit in the claim that plaintiffs in error asked the aid of the state court in the elimination of a formal and technical objection to the removal.

In *Remington vs. Central Pacific R. Co.,* 198 U. S. 95,

98, it is said: "Coming then to the motion to remand, it is said that the petition to remove was filed too late, because the time for answer had expired. * * * But it is sufficient reply to the motion and to the objection to the removal that *the petition was filed as soon* as the case became a removable one. * * * The suggestion that the defendant was estopped by the fact that it followed up its motion to stay in the state court in accordance with its notice, on October 24, when the right to remove had been made to appear the day before, seems to us too technical, supposing it to be open here. Indeed, it was a proper preliminary in one respect. The order made on that motion was 'that the defendant be relieved from any default in appearing herein, and that all proceedings on the part of the plaintiff be stayed, pending said appeal and until ten days after the decision thereof, except' an order for the examination of the plaintiff. *It did not estop the defendant from insisting on a substantial right, that it got rid of a purely formal objection, which is still pressed,—in our opinion, without ground. Dancel v. Goodyear Show Mach. Co.*, 106 Fed. 551. The order did not take effect until October 26. *Wilcox v. National Shoe & Leather Bank*, 67 App. 466, 73 N. Y. Supp. 900; *Hastings v. Twenty-third Ward Land Improv. Co.*, 46 App. Div. 609, 61 N. Y. Supp. 998; *Vilas v. Page*, 106 N. Y. 439, 355, 13 N. E. 743.

"It is urged that the petition did not justify removal, because the allegation that the time had not arrived at which the defendant was required to answer or plead was an allegation of a conclusion of law. Allegations which involve such conclusions import that the facts which justify them are true. Many such allegations are permitted, to avoid an intolerable prolixity on matters not likely to be controverted. *Haskel v. Merrill*, 179 Mass. 120, 123, 60 N. E. 485; *Alton v. First Nat. Bank*, 157 Mass. 341, 343, 18 L. R. A. 144,

34 Am. St. Rep. 285, 32 N. E 288; *Com. v. Clancy,* 154 Mass. 128, 132, 27 N. E. 1001; *Windrum v. French,* 151 Mass. 547, 551, 8 L. R. A. 750, 24 N. E. 914; Evans, Pl. 1st ed. 48, 139, 143-146, 149-157, 164. The facts appeared of record. When the defendant expected the plaintiff to demand more than $2,000 is immaterial. The only material point is when the demand was stated in the case. Assuming the objection to be open here, if there was any defect, which we do not imply, it was but a defect of form. *Powers vs. Chesapeake & O. R. Co.,* 169 U. S. 92, 98, 101, 42 L. ed. 673, 675, 676, 18 Sup. Ct. Rep. 264. The presenting of the petition to a judge in chambers, and the filing of it in the state court, satisfied the statute. See *Noble v. Massachusetts Ben. Asso.* 48 Fed. 337; *Loop v. Winters,* 115 Fed. 362.

"We come then to the setting aside of the summons. We assume for purposes of decision, as we have already assumed, that *Shepard v. Adams,* 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214, is consistent with the decisions that the jurisdiction of the circuit court as a Federal court only is in question. *Louisville Trust Co. v. Knott,* 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; *Bache v. Hunt,* 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; *Courtney v. Pradt,* 196 U. S. 89, *ante,* 398, 25 Sup. Ct. Rep. 208. If there has been no valid service the court has no power, and a distinction is possible between such a case and a mere question touching the proper limits between equity and law, or the traditional authority of the court. We leave *Shepard v. Adams* as we find it, since a reconsideration of the point is not necessary to decide the present case. It is said that the decision of the state court, although appealed from, was *res judicata.* But it stood no higher than a similar decision made by the circuit court, if the case had been begun before that court. It may be that the defendant would have had no

right to renew its motion, but the circuit court would have had power to give it leave. If the circuit court was satisfied with it, or its predecessor the state court, had made a mistake, it had power to reopen the matter. It did so, and its action in that respect is not open to question here. However stringent may be the practice in refusing to reconsider what has been done, is still is but practice not want of jurisdiction, that makes the rule."

Further on these questions and on the right to file the second petition for removal:

In *Powers vs. Chesapeake, etc., Company,* 169 U. S. 92, 98, it is said: "The existence of diverse citizenship, or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion, and cannot be waived by either party. *Manchester, etc., Railway v. Swan,* 111 U. S. 379. *But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice Bradley, "but modal and formal," and a failure to comply with it may be the subject of waiver or estoppel. Ayers v. Watson,* 113 U. S. 594, 597-599; *Northern Pacific Railroad v. Austin,* 135 U. S. 315, 318; *Martin v. Baltimore & Ohio Railroad,* 151 U. S. 673, 688-691; *Connell v. Smiley,* 156 U. S. 335.

"Undoubtedly, when the case, as stated in the plaintiff's declaration, is a removable one, the defendant *should file his petition* for removal at or before the time when he is required by the law or practice of the State to make any defence whatever in its courts. *Edrington v. Jefferson,* 111 U. S. 770; *Baltimore & Ohio Railroad v. Burns,* 124 U. S. 165; *Kansas City, etc. Railroad v. Daughtry,* 138 U. S. 298; *Martin v. Baltimore & Ohio Railroad,* 151 U. S. 673, 686, 687.

"But it by no means follows, when the case does not become in its nature a removable one until after the time mentioned in the act has expired, that it cannot be removed at all.

"The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that *the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right;* and to consider the statute as, in intention and effect, permitting and requiring the defendant *to file a petition* for removal as soon as the action assumes the shape of a removable case in the court in which it was brought.

"In the case at bar, the second petition for removal, as presented to the state court, alleged that the petitioner was a citizen of the States of Virginia and West Virginia only; that the plaintiff was a citizen of the State of Kentucky; that Evans and Hickey had been fraudulently and improperly joined as defendants for the purpose of defeating the petitioner's right of removal; that because of their joinder the case had been remanded to the state court, and that the action, having been discontinued against them, was now for the first time pending against the petitioner alone; and by the transcript previously filed in the state court, of the record of the proceedings in the circuit court of the United States upon the first petition for removal, containing the opinion and order remanding the case, it appeared to have been admitted that the individual defendants were citizens of Kentucky.

"It was thus made to appear, upon the record of the state court, that the case could not have been removed before, and that it had now become in its nature removable by reason of the diverse citizenship of the parties. Such being the case it was rightly removed by the second petition for removal

into the circuit court of the United States; and his petition was rightly permitted to be amended in that court."

The italics in the quotations are, of course, ours.

Respectfully submitted,

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for Plaintiffs in Error.

(22,353)

Supreme Court of the United States

OCTOBER TERM, 1910.

NO. 732.

McLAUGHLIN BROS., A COPARTNERSHIP, (JOHN R. McLAUGHLIN AND JAMES B. McLAUGHLIN, SOLE MEMBERS OF THE COPARTNERSHIP), *Plaintiffs in error.*

vs.

L. A. HALLOWELL, ET AL., *Defendants in error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Brief for Plaintiffs in Error.

STATEMENT OF THE CASE.

FEDERAL QUESTION.

The federal question presented is whether a state statute permitting an action to be brought against a partnership in the partnership name without joining the members thereof in their individual names has the effect to divest a partnership when so sued of the right of removal which it would have under the Federal constitution and statutes if the partners had been named individually as defendants. (Opinion below, printed Tr. p. 42.)

RECORD ON REMOVAL QUESTION.

On December 16, 1903, the defendants in error filed in the office of the clerk of the District Court in and for Pocahontas County, Iowa, their petition naming as defendants "McLaughlin Brothers a copartnership" and claiming Three Thousand Dollars for breach of warranty in the sale of stallions. (Tr. p. 1.) The property was alleged to have been purchased by defendants in error from plaintiffs in error for breeding purposes solely. (Tr. p. 2.) In one of the written contracts set out in the petition upon which the action was based the defendants in error were described as being "of Fonda, Iowa." (Tr. p. 5, Ex. B.) It was alleged that the horse was brought by defendants in error "to Fonda, Iowa where they stood him during the stud season," etc., and it is also alleged that the "horse was delivered to the said plaintiffs and was shipped at once to Fonda, Iowa" (Tr. p. 2, 3.) The petition was verified in Pocahontas County, Iowa. (p. 4.) A writ of attachment to the sheriff of Pocahontas County, Iowa, was sued out and the United States Express Company garnished thereunder. (p. 5.)

On the first day of the January term, 1904, of the District Court of Pocahontas County, the plaintiffs in error filed their petition for removal alleging that they were a co-partnership composed of John R. McLaughlin and James B. McLaughlin sole partners in and members of said co-partnership doing business at the city of Columbus in the state of Ohio; that at the time of the commencement of the action and ever since and at the time of the filing of the petition the said co-partnership, McLaughlin Brothers, and the said James B. McLaughlin and John R. McLaughlin and each of them were residents, citizens and inhabitants of the state of Ohio and neither the partnership nor any member thereof was at said times a resident, citizen or inhabitant of the State of Iowa; that the defend-

ants in error and each of them at the time of the commencement of the action and at the time of the filing of the petition for removal were residents, citizens and inhabitants of the State of Iowa and not of the State of Ohio; that there was a controversy in said suit between the plaintiffs and defendants wherein the matter in dispute exceeded, exclusive of interest and costs, the sum or value of Two Thousand Dollars, etc. Plaintiffs in error also filed their bond for removal in proper form and asked that the petition and bond be accepted and the cause removed. (Tr. p. 6, 7.)

On December 5, 1904, there was filed in the office of the Clerk of the District Court of Pocahontas County, Iowa, an order of the Circuit Court of the United States for the Northern District of Iowa sustaining a motion to remand the cause for want of jurisdiction "by reason of lack of evidence in the transcript filed herein that said defendant had been served with notice of said proceedings." (P. 7, 8.)

On the first day of the regular January term, 1905, of the District Court of Pocahontas County, Iowa, John R. McLaughlin and James B. McLaughlin appeared and filed motion for substitution setting up diversity of citizenship and the existence of a removable controversy and alleging that they were sole members and partners in the firm of McLaughlin Brothers and the sole parties defendant in interest and that they were sued under the firm name of McLaughlin Brothers and were entitled to have the cause removed to the Circuit Court of the United States in and for the Northern District of Iowa and alleging that the only effect of maintaining the action against them in their partnership name was to prevent a removal to the said Circuit Court and they therefore moved the court, first, for an order substituting them in their individual names as sole parties defendant and permitting them to appear, answer and defend in their individual names. Second, if that was overruled then for an order joining

John R. McLaughlin and James B. McLaughlin as parties defendant in their individual names and permitting them to appear, answer and defend in their individual names. (P. 8.)

On the same date McLaughlin Brothers appeared and filed a like application for substitution or joinder of parties, (p. 9) and at the same time the plaintiffs in error filed their petition and bond for removal showing the diversity of citizenship and a removable controversy. (P. 9, 10.)

On January 24, 1905, the defendants in error filed objections to the motion for substitution, assigning as reasons that John R. McLaughlin and James B. McLaughlin were not entitled to file or make motion for substitution; that they were not parties, not named or joined as defendants and were interlopers; that defendants in error were entitled to bring their action solely against the partnership without joining the members of the firm as defendants and that such members could not be joined or substituted over the objection of defendants in error and that plaintiffs in error were not entitled to have a cause of action brought against a co-partnership tried in the Circuit Court of the United States. (P. 11.)

On the 20th day of March, 1905, defendants in error filed objections to petition for removal assigning as grounds that the petition failed to show a compliance with the provisions of the Federal statute; that it was filed too late; that plaintiffs in error were not entitled to a removal as prayed in their petition; that the petition for removal was not made by the sole party defendants but by persons not made parties to the suit and not entitled to apply for or secure a removal and that the record affirmatively showed that the suit was pending at the January, 1904, term of the District Court of Pocahontas County, Iowa, and that plaintiffs in error appeared at said term and were required to answer not later than the March term, 1904, and that the record affirmatively showed

that there was no diversity of citizenship entitling the removal to the United States Circuit Court. (P. 12, 13.)

No claim was made that the defendants in error were not residents of the Northern District of Iowa or that that was not the proper District in which they could be sued or that the Circuit Court thereof was not one in which an action between these parties could be maintained. No objection to the District or venue and no question of privilege was made in any form. (P. 11-13.)

On May 1, 1905, these objections of the defendants in error were sustained and the petition for removal denied and the plaintiffs in error excepted. (P. 13.)

Thereafter the defendants in error filed various amendments to their petition (p. 14-19), and on the 21st day of August, 1905, the plaintiffs in error filed their plea to the jurisdiction and answer setting up the diversity of citizenship and removable amount in controversy and the proceedings by which they had sought a removal and averring that by reason thereof the District Court of Pocahontas County, Iowa, had no jurisdiction to proceed further and that the Circuit Court of the United States in and for the Northern District of Iowa had sole and exclusive jurisdiction to proceed further and claiming the right to plead and to have the action tried in said Circuit Court of the United States under and in virtue of the constitution, statutes and laws of Congress. (P. 20.) The plaintiffs in error also joined issue upon the merits, (P. 21), after which the defendants in error filed other amendments to their petition. (P. 22.)

The case came on for trial before the District Court of Pocahontas County, Iowa, on the 21st day of January, 1908. (P. 23.)

At the trial the plaintiffs in error offered in evidence the record of filings in the cause. They also offered the proceedings for removal which last were objected to by defendants in

error generally as incompetent, irrelevant and immaterial. The objection was sustained and plaintiffs in error excepted. (P. 23-25.) The record showed no original notice or service thereof, or appearance prior to the first day of January term, 1905.

At the conclusion of the evidence the plaintiffs in error moved the court to direct a verdict in their favor upon the ground among others that the District Court of Pocahontas County, Iowa, had no jurisdiction of the action by reason of the proceedings for removal of the cause to the Circuit Court of the United States in and for the Northern District of Iowa and the defendants expressly claimed that under the laws of Congress of the United States the court had no jurisdiction to proceed further and would have no jurisdiction to render judgment therein against plaintiffs in error. The motion was overruled and the plaintiffs in error excepted. (P. 25.)

The court thereupon instructed the jury (26) who afterwards returned a verdict in favor of the defendants in error for Twenty-nine Hundred Dollars besides interest. (P. 32.)

On January 27, 1908, the plaintiffs in error filed motion for new trial objecting and excepting that the District Court of Pocahontas County, Iowa, had no jurisdiction and insisting on their plea to the jurisdiction filed. (P. 32.)

On January 30, 1908, the motion for new trial was overruled and judgment rendered in favor of the defendants in error and against the plaintiffs in error for Thirty-seven Hundred 02-100 Dollars and costs (p. 33.)

On April 21, 1908, the plaintiffs in error duly appealed to the Supreme Court of Iowa (p. 33.)

It probably should be explained that a previous trial was had in the District Court and a verdict directed in favor of the plaintiffs in error. That the defendants in error appealed

to the Supreme Court of Iowa and the judgment was reversed.

Hallowell vs. McLaughlin Brothers, 136 Iowa, 279.

OPINION OF IOWA SUPREME COURT.

On the last appeal the Supreme Court of Iowa on July 2d, 1909, decided the Federal question as follows:

"This action was commenced in December, 1903. It was transferred to the United States Circuit Court upon the defendant's application, where it was remanded to the state court, because of want of jurisdiction of the Federal Court. In January, 1905 the defendants filed an application in the District Court for the substitution of John R. and James B. McLaughlin as defendants. This was denied, and since such denial both trials have taken place and more than three years elapsed, and the defendants now appeal from the order denying substitution.

There was no right of substitution. The statute (Code Sec. 3468) expressly provides that a partnership may sue or be sued as a distinct legal entity. *Brumwell v. Stebbins*, 83 Iowa, 425, 49 N. W. 1020; *Ruthven v. Beckwith*, 84 Iowa, 715, 45 N. W. 1073, 51 N. W. 153; *Baxter v. Rollins*, 110 Iowa, 310, 81 N. W. 586. Under this statute the plaintiffs had the absolute right to sue the partnership alone or to join in such suit the individual members of the partnership. They chose the former course, and they cannot be deprived of such right upon the application of the partnership, or of the individual members thereof. *Allen v. Maddox*, 40 Iowa, 124; *Ryerson v. Hendrie*, 22 Iowa, 481; *Ballinger v. Tarbell*, 16 Iowa, 493; 85 Am. Dec. 527; *Corporation of New Orleans v. Winter, et al.*, 1 Wheat 91, 4 L. Ed. 44; *Peninsular Iron Company v. Stone*, 121 U. S. 631, 7 Sup. Ct. 1010, 30 L. Ed. 1020.

The plaintiffs clearly had the right to sue McLaughlin Brothers, the partnership alone. This they could not do in the Feceral Court, and the case was therefore not removable. *Ex Parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264." (Tr. p. 42.)

JUDGMENT AND WRIT OF ERROR.

The judgment against plaintiffs in error was affirmed and thereupon this writ of error was sued out. (43-45.) The original bond on writ of error having been lost, substitution was had and certified here separately (see amndt. to records.)

STATUTES OF IOWA.

The statutes of Iowa so far as material are as follows:

"Actions may be brought by or against a partnership as such, or against all or either of the individual members thereof, or against it and all or any of the members thereof; and a judgment against the firm as such may be enforced against the partnership property, or that of such members as have appeared or been served with notice. A new action may be brought against the members not made parties, on the original cause of action." Code 1897 Sec. 3468.

"Action in a court of record shall be commenced by serving the defendant with a notice signed by the plaintiff or his attorney informing him of the name of the plaintiff, that a petition is or on or before the date named therein will be filed in the office of the Clerk of the Court wherein action is brought naming it, and stating in general terms the cause or causes thereof, and if it is for money, the amount thereof, and that unless he appears thereto and defends before noon of the second day of the term at which defendant is required to appear, naming it, his default will be entered and judgment

or decree rendered against him thereon. In all cases where the time for the commencement of the term has been changed after the notice has been served, the defendant shall be held to appear at the time to which such term has been changed." Code 1897, Sec. 3514.

"The defendants shall be held to appear at the next term after service:

1. If served within the county where the action is brought in such time as to leave at least ten days between the day of service and the first day of the next term.

2. If without the county, but within the judicial district so as to leave at least fifteen such days.

3. If elsewhere, so as to leave at least twenty such days for every one thousand miles, or fraction thereof, extending between the places of trial and service, which distance shall be judicially noticed by the court." Code 1897, Sec. 3517.

Sections following provide the method of service personally and by substitution and publication which are not material here.

"Mode of appearance may be:

1. By delivering to the plaintiff or the Clerk of the Court a memorandum in writing to the effect that the defendant appears, signed either by the defendant in person or his attorney, dated the day of its delivery, and to be filed in the case:

2. By entering an appearance in the appearance docket or judge's calendar, or by announcing to the court an appearance, which shall be entered of record:

3. By an appearance, even though specially made, by himself or his attorney, for any purpose connected with the cause, or for any purpose connected with the service or insufficiency of the notice, and an appearance, special or other, to object to the substance or service of the notice, shall render any further notice unnecessary, but may entitle the defendant to a continuance, if it shall appear to the court that he has not

had the full timely notice required of the substantial cause of action stated in the petition." Code 1897, Sec. 3541.

"The defendant shall, in an action commenced in a court of record, demur or answer to the original petition, or assail the same by motion before noon of the second day of the term." Code of 1897, Sec. 3550.

"Matter in abatement may be stated in the answer or reply, either together with or without causes of defense in bar, and no one of such causes shall be allowed to overrule the other; nor shall a party, after trial in matter of abatement, be allowed in the same action to answer or reply matter in bar." Code 1897, Sec. 3642.

ASSIGNMENTS OF ERROR.

And the plaintiffs in error, and each of them severally say that there is manifest error on the face of the record in this, to wit:

First. The Supreme Court of Iowa erred in holding that under the statute of Iowa (Code Section 3468), which provides that actions may be brought by or against a partnership as such, or against all or either of the individual members thereof, or against it and all or any of the members thereof, a suit brought by a citizen of Iowa in the District Court of Iowa against a partnership not a citizen of Iowa and composed entirely of citizens of another state can not be removed to the Circuit Court of the United States if the defendants are sued in their partnership name although the action would be otherwise removable.

Second. The Supreme Court of Iowa erred in not holding and determining that the provisions of Section 3468 of the Code of Iowa are limited and controlled by the provisions of the Constitution and statutes of the United States con-

ferring upon the courts of the United States jurisdiction of controversies between citizens of different states.

Third. The Supreme Court of Iowa erred in affirming and sustaining the order of the District Court of the State of Iowa in and for Pocahontas County rendered on the twenty-fifth day of April, 1905, and entered on the first day of May, 1905, as follows:

"1. That the exceptions of the plaintiff to the motion for substitution of John R. McLaughlin and James B. McLaughlin are sustained and the motion to substitute the said John R. McLaughlin and James B. McLaughlin made by the defendant and said John R. McLaughlin and James B. McLaughlin is denied and overruled.

"2. That the exceptions filed by the plaintiffs to the motion and application of McLaughlin Brothers and John R. McLaughlin and James B. McLaughlin to permit the said John R. McLaughlin and James B. McLaughlin to join in the defense of said cause are sustained, and the motion and application of the said McLaughlin Brothers and the said John R. McLaughlin and James B. McLaughlin as parties defendant herein is overruled and denied.

"3. The petition for removal of the case herein to the United States Circuit Court is denied, and the exceptions to said petition and application for removal filed by the plaintiffs is sustained."

Fourth. The Supreme Court erred in affirming the order of the District Court of the State of Iowa in and for Pocahontas County, Iowa, denying and overruling the motion of John R. McLaughlin and James B. McLaughlin for substitution, wherein the said John R. McLaughlin and James B. McLaughlin moved the court as follows:

"1. For an order herein substituting these defendants in their individual names as sole parties defendant herein, and

permitting them to appear herein and answer and defend in their individual names.

"2. If the foregoing is overruled, then, that an order be made joining the said John R. McLaughlin and James B. McLaughlin as parties defendant herein, in their individual names and permitting them to appear, answer, and defend in their individual names."

Fifth. The Supreme Court of Iowa erred in affirming the order of the District Court in and for Pocahontas County denying and overruling the motion of McLaughlin Brothers or application for substitution of parties wherein they moved the court as follows:

"1. That the said defendant John R. McLaughlin and James B. McLaughlin be substituted in place of the defendants, McLaughlin Brothers, as sole parties defendant herein and that they be permitted to appear, answer and defend in their individual names.

"2. If the foregoing is overruled, then that the said John R. McLaughlin and James B. McLaughlin be joined as parties defendant herein and be permitted to appear, answer and defend in their individual names."

Sixth. The Supreme Court of Iowa erred in affirming the action and order of the District Court of the State of Iowa in and for Pocahontas County wherein and whereby said courts denied and overruled the petition of McLaughlin Brothers, John R. McLaughlin and James B. McLaughlin to remove this action to the Circuit Court of the United States in and for the Northern District of Iowa and to proceed no further therein filed January 16, 1905, and the court erred in denying and overruling the said petition as to the said John R. McLaughlin and James B. McLaughlin, and as to the said McLaughlin Brothers. (47.)

BRIEF OF ARGUMENT.

First.

The statute of Iowa set out above, Code Section 3468, providing that actions may be brought by or against a partnership as such, is merely a permissive rule of practice and cannot have the effect of nullifying a right of removal to the Federal Courts given by the statutes of the United States under constitutional authority.

Marshall vs. Baltimore, etc. Co., 16 How. 314, 326;
Clark vs. Bever, 139 U. S. 96, 102;
Barron vs. Burnside, 121 U. S. 186, 198;
Madisonville, etc. Co. vs. St. Bernard, etc. Co., 196 U. S. 239, 249;
Mason City & Ft. Dodge Ry. Co. vs. Boynton, 204

First (a).

The action may be maintained in the Federal court against the partnership as such because: (a) The statute pertains to the remedy which is governed by the *lex fori*. (b) The statute only prescribes a rule of practice, and this action being at law the state practice will govern. (c) Much more may the action be so maintained, if, as the Supreme Court of Iowa may intend to intimate, the right to sue the partnership as such inhered in the cause of action. The contracts sued on are Iowa contracts.

Breedlove vs. Nicolet, 7 Peters, 413;
Pritchard vs. Norton, 106 U. S. 124, 130;
Baltimore & O. R. Co. vs. Joy, 173 U. S. 226, 228;
Patton vs. Brady, 184 U. S. 608, 612;
City of Greensboro vs. Southern etc. Co., 168 Fed. 880;
Edmunds vs. Illinois Central R. Co., 80 Fed. 78;
Davis vs. Rawhide Gold M. Co., (Cal.) 113 Pac. 898;
Nederland Life Ins. Co. vs. Hawe, 84 Fed. 278;
Farmers Bank vs. Wright, 158 Fed. 841.

Great Southern vs. Jones, 177 U. S. 449, 455, 456;
H. L. Bruett & Co. vs. F. C. Austin Drainage Co., 174 Fed. 668;
Jewish Colonization Co. vs. Solomon, etc., 125 Fed. 994;
United States Bank vs. Deveaux, 5 Cranch 61;
Commercial Bank vs. Slocomb, 14 Peters 60;
Marshall vs. Railroad Co., 16 Howard 314;
Louisville Ry. Co. vs. Letson, 2 Howard 497;
Liverpool Co. vs. Agar, 14 Fed. 615;
Bushnell vs. Park Brothers, 46 Fed. 209;
Chapman vs. Barney, 129 U. S. 677, 682;
Remington vs. Cent. Pac. R. Co., 198 U. S. 99, 100.

Third.

In removal cases the Federal Court will disregard mere matters of form.

Barney vs. Lathan, 103 U. S. 205, 211.

And after removal has ample power by ordering repleading or amendment to bring about conformity with the practice in the Federal Courts.

Richmond vs. Irons, 121 U. S. 27, 51;
Northern Pacific Railroad Company vs. Paine, 119 U. S. 561, 564;
Stewart vs. Dunham, 115 U. S. 61;
Phelps vs. Oaks, 117 U. S. 236.

Fourth.

The Supreme Court of Iowa in saying that the plaintiffs could not sue McLaughlin Brothers, the partnership alone, in the Federal Court, confuses a matter of practice with a

question of jurisdiction. The question of the party to be sued is one of procedure and is regulated by the *lex fori.*

Saunders vs. Adams Express Company, (N. J.) 57 Atl. 899, 900.

The Federal Courts will recognize and give effect to the State law making a partnership an entity.

Breedlove vs. Nicolet, 7 Peters 413;
Marshall vs. Baltimore, etc. Co., 16 Howard 314;
Liverpool, etc. Co. vs. Agar, 14 Fed. 615;
Martin vs. Meyer, 45 Fed. 435.

If the suit had been originally commenced in the United States Circuit Court against the defendants in their partnership name objection thereto if tenable at all would have been at most available only on demurrer or plea. If the objection was not so taken it would have been waived.

Gilman vs. Cosgrove, 22 Cal. 356;
Bluegrass Canning Company vs. Wardman, (Tenn.) 52 S. W. 137;
Brookmire vs. Rosa, (Neb.) 51 N. W. 840;
McIndoe vs. Hazleton, 19 Wis., 567, 88 Am. Dec. 701.

Fifth.

If a suit could not be maintained in the Federal Court because the defendants were sued in their partnership name, the members of the partnership would have the right to apply to be substituted and as there was the requisite diversity of citizenship the cause was removable.

Ralya Market Co. vs. Armour & Co., 102 Fed. 530;
Chapman vs. Barney, 129 U. S. 677, 682.

The motions for substitution made by the plaintiffs in error should on this theory, have been sustained.

Sixth.

The proceedings taken with a view to removal have the effect of being taken in the Federal Court rather than in the State Court and are to be construed and given effect under and in accordance with Federal statutes rather than the state statutes.

Chesapeake & O. R. Co. vs. McCabe, 213 U. S. 207;
Texas & Pac. Ry. Co. vs. Eastin, 214 U. S. 153.

Seventh.

The petition for removal affirmatively shows the citizenship of the defendants in error in Iowa and of the plaintiffs in error in Ohio, and therefore affirmatively shows that the cause is one within the general jurisdiction of the Circuit Courts of the United States. A failure to specifically show the District in Iowa in which the defendants in error reside would not affect the jurisdiction. That is merely a matter of venue or personal privilege which the defendants in error might insist upon or waive at their election.

In re Moore, 209 U. S. 490;
Western L. & S. Co. vs. Butte-etc. Co., 210 U. S. 368;
Clark vs. Wells, 203 U. S. 164;
Kreigh vs. Westinghouse, 214 U. S. 249.

The petition for removal is in the usual and well recognized form frequently approved. It is not necessary to set out the district of plaintiff's residence.

Remington vs. Cent. Pac. R. Co., 198 U. S. 95, petition set out in 34 Cyc. 1284.

Eighth.

The recital in the contract sued upon that the defendants in error were of Fonda, Iowa, the allegations in their petition that the stallions were purchased and used for breeding purposes and were brought by them to Fonda, Iowa; the verifying of the petition in Pocahontas County; the bringing of the suit there and the garnishment of the United States Express Company in that county and the absence of any claim either on the first removal or the second application for removal that the defendants in error were not residents of Pocahontas County, Iowa, or that they were personally privileged from suit in the Northern District of Iowa, were sufficient as against any claim that may be now made that the venue is not sufficiently laid.

Jones vs. Andrews, 10 Wallace 327, 331;
Kinney vs. Columbia Savings & Loan Association, 191 U. S. 78;
Sun. P. & P. Co. vs. Edwards, 194 U. S. 377, 382;
Rucker vs. Bolles, 80 Fed. 504.

Ninth.

The order remanding the cause upon the first removal was upon the specific ground of lack of evidence in the transcript that plaintiffs in error had been served with notice of the proceedings and excludes the ground of error in the venue, or privilege. The defendants in error made objections to motions for substitution and to the petition for removal. In these objections the general statement that the petition failed to show a compliance with the provisions of the Federal statute was followed with the specification that the petition for removal was filed too late and not within the time that the plaintiffs in error were required to appear and answer,

and the further general statement that the record affirmatively showed that the plaintiffs in error were not entitled to a removal was followed by the specifications that the petition for removal was not made by the sole party defendant but by certain persons not parties and that the record affirmatively showed that the plaintiffs in error were required to answer at the January term, 1904, or not later than the March term, 1904, and these statements were followed by the general assertion that the record showed affirmatively that there was no diversity of citizenship. No objection that the defendants in error were personally privileged from suit in the Northern District of Iowa or that the venue could not be laid in that district was made. The general objections did not relate to matters of personal privilege or to venue nor did the specific objections. The expression of one is the exclusion of the other and under the maxims of *ejusdem generis* and *noscitur a sociis* the objections should be limited to those specifically set forth.

The objection that defendants in error were not residents of the Northern District and could not be sued there was not made, and by not being made was waived.

Ingersoll vs. Coram, 211 U. S. 335, 355, 356.

Tenth.

The objection if made was one which might have been obviated by amendment.

Powers v. Ches. & Ohio R. Co., 169 U. S. 92, 101;

Robertson vs. Ceas, 97 U. S. 646;

Kinney vs. Columbia Savings & Loan Association, 191 U. S. 78.

Tomson v. Iowa State T. M. Assn., (Neb.) 110 N. W. 997.

Eleventh.

There was a waiver of any claim to personal exemption.

Ingersoll v. Coram, 211 U. S. 335, 355, 356;
Jones vs. Andrews, 10 Wallace 327;
Western L. & S. Co. vs. Butte & B. C. M. Co., 210 U. S. 368;
In re Moore, 209 U. S. 490;
Kreigh v. Westinghouse, 214 U. S. 249;
Kinney v. Columbia Sav. & L. A., 191 U. S. 78.

Twelfth.

By section 9 of the statute dividing Iowa into two judicial districts, 22 Stat. L. 172, 4 Fed. Stat. Ann. 637, Pierce's U. S. Code Sec. 6658, it is provided: "That all civil suits not of a local nature must be brought in the division of the northern or southern district where the defendant or defendants reside; but if there are two or more defendants residing in different divisions, the action may be brought in either of the divisions in which a defendant resides. When the defendant is a non-resident of either district action may be brought in any division of either district wherein the defendant may be found. Causes removed from any of the courts of the State of Iowa to the circuit court of the United States shall be removed to the circuit court in the division in which said State court is held." By section one of the act of February 24, 1891, 26 Stat. L. 767, 4 Fed. Stat. Ann 30, Pierce's U. S. Code Sec. 6661 which was enacted after the present statute defining jurisdiction of the Federal courts, it is provided that "all the provisions of said act approved July 20, 1882 shall be applicable to the division created by this act."

This statute does not limit cases against defendants residing in different divisions to cases in different divisions of

the same district. It authorizes jurisdiction to be taken in case the defendant is a non-resident of either district and is found in one of them and in the same connection authorizes a removal to the circuit court in the division in which the state court is held. This is an excepted statute and was not repealed by the act of March 2, 1887, as corrected by the act of August 13, 1888.

Petri vs. F. E. Creelman Lumber Co., 199 U. S. 487.

Under this statute and under the showing made here of a case within the general jurisdiction of the Federal court the case was removable. Id.

Thirteenth.

There was no service of process or original notice upon the plaintiffs in error and the filing of the first petition for removal was not an appearance.

Wabash Western Ry. vs. Brow, 164 U. S. 271;
Clark vs. Wells, 203 U. S. 164;
Mechanical Appliance Co. vs. Castleton, 215 U. S. 437.

Fourteenth.

An action is not commenced in Iowa until the completed service of original notice and no appearance or plea can be required until the requisite time after such completed service.

Code, Sec. 3514, 3517, 3541, 3550, printed in full *supra*;
Littlejohn v. Bulles, 136 Ia., 150;
Keller v. Harrison, 139 Ia., 383.

The case was remanded on the first application for removal because the state court had not acquired jurisdiction. There having been no service the plaintiffs in error were not required to plead until after they appeared. They filed their applications for removal immediately upon appearance. Therefore the application was in time.

Powers v. Ches. & Ohio R. Co., 169 U. S. 92, 100, 101;

Greeman vs. Butler, 39 Fed. 1;

Fritzlen vs. Boatmen's Bank, 212 U. S. 364, 372;

Tortat vs. Hardin Mercantile Manufacturing Co., 111 Fed. 426;

Southern Pacific Ry. Co. vs. Stewart, (Ga.) 13 S. E. 824.

Fifteenth.

The case having been remanded solely because of absence of notice, the defendants on appearing and filing motions for substitution were entitled to renew their applications for removal.

Fritzlen v. Boatmen's Bank, 212 U. S. 364, 372;

Powers v. Ches. & Ohio R. Co., 169 U. S. 92, 100, 101.

Sixteenth.

The judgment from which this writ of error is taken is the only final judgment in the Supreme Court of the state from which the plaintiffs in error could prosecute a writ of error, and the intermediate proceedings are not a bar to the present writ.

Chesapeake & Ohio R. Co., vs. McCabe, 213 U. S. 207, 214;

Texas & Pacific R. Co., vs. Eastin, 214 U. S. 153;
Powers vs. Chesapeake & Ohio R. Co., 169 U. S. 92.

The plaintiffs in error excepted to the denial of the petition for removal and in their answer insisted on absence of jurisdiction of the state court, and all the time protested against remaining in the state court. They had the right to do this and to rely upon their right to this writ of error in case they were finally defeated in the state court.

Chesapeake & Ohio. R. Co. vs. McCabe, 213 U. S. 207;
Texas & Pacific R. Co. vs. Eastin, 214 U. S. 153.

It is respectfully submitted that the judgment of the Supreme Court of Iowa should be reversed.

CHARLES A. CLARK,
EDGAR A. MORLING AND
WILLIAM H. MORLING,
for Plaintiffs in Error.

(22,353)

Supreme Court of the United States.

OCTOBER TERM, 1910.

NO. 732.

McLAUGHLIN BROS., A CO-PARTNERSHIP, (JOHN R. McLAUGHLIN AND JAMES B. McLAUGHLIN, SOLE MEMBERS OF THE CO-PARTNERSHIP), *Plaintiffs in error.*

vs.

L. A. HALLOWELL, ET AL, *Defendants in error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Brief for Defendants in Error.

STATEMENT.

On December 16, 1903, L. A. Hallowell, N. Barron, A. Moulton, S. Barron, N. Norton, and Lars Larson, as plaintiffs, filed in the office of the Clerk of the District Court of Pocahontas County, Iowa, a petition in four counts, seeking to recover $3000.00 for breach of warranties, misrepresentations and failure of consideration in the sale of certain stallions which the plaintiffs purchased from the defendant. "McLaughlin Brothers, a co-partnership" was named as the sole defendant in the case. The names of the individual co-partners although inserted in the caption of the abstract of the record, which was made by the defendant upon appeal to

the Supreme Court of Iowa and hence appearing in the record in this court, viz: "John R. McLaughlin and James B. McLaughlin, sole members of the co-partnership", were not in fact made parties nor in any manner named in the petition or proceedings which were instituted by the plaintiffs who brought the suit. This appears from the correction of the record which was made by the plaintiffs who were the appellees upon the last appeal to the Supreme Court of Iowa. (Record pp. 35-36.)

Neither in this petition nor in any amendment thereof, nor in any of the various petitions for removal, nor in any part of the record is it made to appear that any of the parties to the suit, either plaintiff or defendant, were residents of, or domiciled in the Northern District of Iowa.

The plaintiffs in that suit at all times objected to the removal of the cause into the United States Circuit Court. This objection was made by motion to remand upon the removal as first made, and after the remand of the case, by objections to the attempt of the individuals John R. McLaughlin and James B. McLaughlin to cause a second removal upon their individual petition.

The partnership of McLaughlin Brothers at the time of the occurrence of the matters out of which the suit arose, maintained an establishment at Emmetsburg, Iowa, for the sale of stallions, employing at that point managers and agents, and here it had a regular place of business and made and entered into contracts, both written and verbal which contracts were made in the partnership name—"McLaughlin Brothers." It was upon such contracts that the suit was founded.

Upon the filing of the petition which prayed the issuance of a writ of attachment, an order of court was obtained and the writ of attachment was ordered, conditioned upon the filing of a bond, which was thereafter filed, and under this writ

of attachment, garnishment process was served upon certain debtors of McLaughlin Brothers in Pocahontas County, Iowa, the county where the suit was brought.

A petition for removal was filed by the co-partnership, "McLaughlin Bros.", on the first day of the January, 1904 term of the Pocahontas District Court, and this petition was sustained by the State Court and the case was at once removed into the United States Circuit Court for the Northern District of Iowa at Fort Dodge, Iowa, where the said cause remained pending for ten months. The proceedings had in the Federal court in that period of ten months, during which time two sessions of the United States Circuit Court were held at Fort Dodge, are not shown in the record. The many pleas and motions which were made in that court during those two sessions are not referred to and were not offered in making up the record upon the trial in the state court. The plaintiffs in error omitted to show such proceedings and the defendants in error have supposed the only important fact connected with the proceedings in the Federal court was the remanding of the case by such court, and therefore took no steps to show in the record in this cause, the appearances and proceedings in the United States Circuit Court.

The record fails to show when, if at all, an original notice was served on the defendant. In the Brief filed in this court, it is for the first time in the history of the litigation claimed that the suit was not commenced until the motions and applications for substitution of parties were filed in January, 1905, after the case had been remanded by the Federal Court.

This omission never assumed any importance until the claim was put forward in the Brief filed in this court that the action was not really commenced until the proceedings at the January, 1905, term of the state court.

Directly contrary to the claim now put forward in one of the divisions of the Answer filed by the said McLaughlin

Bros., it is alleged in substance that the action was commenced and that the defendants were required to respond to such action at least from about December, 1903, or January, 1904. It is said: "That the plaintiffs herein brought this action and filed therein their petition", averring that the horses were sold upon written contracts, which petition, it is said, claimed that each of the three horses were sold under a specific written contract. It is then charged that the said plaintiffs brought this action, making said allegation claiming the benefit of the contracts, seeking to recover thereon, and demanding judgment; that they sued out a writ of attachment and caused the defendant's property to be garnished "and *thereby* caused and compelled these defendants to come into court and submit to the jusisdiction thereof." And it was alleged that by reason of the premises, the contracts thus sued upon were ratified and the plaintiffs were estopped from changing the ground of their attack inasmuch as defendant had already been brought into court and compelled to defend against claims based on the written contracts (R. 22-23).

It further appears from the pleadings that an amendment was filed by the plaintiffs, May 16, 1905 (Record p. 13), which for the first time set up the fact of the death of the last horse that was furnished to them by McLaughlin Bros. This date was just about one and a half years after the filing of the petition in the first instance.

In answer to this amendment, McLaughlin Bros. charged that the plaintiffs made claims against the defendants "and brought actions thereon" and withheld and concealed from the said defendants the alleged death of the said horse "for about *one and one half years after this action was commenced*", and brought their actions upon the written and alleged implied warranties and elected to rely and bring the action thereon, and "caused these defendants to incur expense in the premises" and that therefore plaintiffs were barred and estopped from changing their ground.

Until the claim was urged in the Brief in this court, we had no reason to suppose that it would be contended that the action was not in fact commenced or the defendants required to appear thereto as alleged in these answers and so understood at all times by the parties.

The state court promptly sent the case to the Federal court upon the filing of the petition in January, 1904.

That case was remanded November 18, 1904, upon the motion of the plaintiffs. A copy of an order accompanied the return of the transcript which recites: "And the court being advised in the premises finds that this court has not jurisdiction in said cause and sustains said motion."

Further on, the order recites: "This court not having jurisdiction by reason of lack of evidence in the transcript filed herein that said defendant had been served with notice of said proceedings." (R. p. 8.)

The portion of the record which has been sent here shows that it was not supposed at the time by plaintiff in error or their counsel that the ground for remanding the case was "lack of evidence in the transcript" in regard to the service of an original notice. The motion for substitution, so styled, in which John R. McLaughlin and James B. McLaughlin asked to be made parties to the cause in place of the co-partnership, McLaughlin Bros., charged "that the only effect of maintaining this action against these defendants in their partnership name *is to prevent a removal of the action to the said United States Circuit Court.*" (R. p. 8.)

This confirms the recollection of District Judge Reed, before whom the cause was heard, that the case was remanded upon the authority of the decision made by District Judge Shiras in *Ralya Market Co. vs. Armour & Co.*, 102 Fed. Rep. 530, which held that where a suit is brought against a co-partnership, it cannot be removed into the Federal court from the state court upon the ground of diversity of citizen-

ship because citizenship cannot be predicated of the co-partnership.

No opinion was filed upon the remanding of the case, but in a subsequent decision, *Bruett & Co. vs. Austin Drainage Excavator Co.*, 174 Fed. Rep. 668, 672, District Judge Reed said: "This court with much hesitancy followed that decision (i. e., *Ralya Market Co. vs. Armour & Co.*) in *Hallowell vs. McLaughlin Bros.* (no opinion filed.)"

Because of this holding, counsel when the case was sent back to the state court, sought to have the individual members of the firm substituted for the co-partnership, and in such motion the individuals were considered and treated as strangers to the record; in fact, at the same time the motion for substitution was filed by these individuals, the firm McLaughlin Bros. filed what was styled an "application for substitution of parties" in which the co-partnership styled itself the "defendants" and made a part of such application, "the statements and allegations contained in the motion of John R. McLaughlin and James B. McLaughlin for substitution of parties defendant, filed herein."

Thus the individuals were clearly differentiated from the firm and the distinction between the individuals and the firm was plainly recognized in the motion for substitution made by the individuals and which commences: "Come now John R. McLaughlin and James B. Laughlin and show the court", *et cetera* (R. p. 8), and the application for substitution made by the firm from which we quoted above, contains the same distinction. (R. p. 9.)

It was thus in effect declared that the *motion for substitution* was being made by persons *not parties to the record.*

Before any ruling on such motion and application was obtained, the individuals who had filed the motion for substitution, styling themselves such individuals and not claiming to

be actual parties to the record, filed another petition for removal, commencing: "Come now John R. McLaughlin and James B. McLaughlin and respectfully show", *et cetera*. (R. p. 9.)

It is thus apparent that the individuals sought the removal of the cause, at the same time recognizing by their motion for substitution that they were not yet parties to the suit, but asking the state court to make them parties in a paper filed at the same time that they filed this petition for removal.

Thus they recognized that *the petition for removal could not be effective at the time of filing it*, because if it was effective, the state court would have had no authority to proceed to act upon the motion for substitution.

The petition for removal was merely filed in the state court; there is absolutely nothing of record to show nor any claim that it was *presented* to the state court for action. Upon the contrary, it appears that it was filed to be presented only in the event the motion for substitution made by individuals who purported to file the petition for removal was not sustained and in the event said individuals should be substituted as the parties to the cause—the co-partnership named as the sole defendant in the petition filed by the plaintiffs.

A presentation of the petition for removal to the court for action would have defeated any hope which the parties had of having the motion and application for substitution sustained. It is not now claimed that the filing of the petition for removal suspended all proceedings in the state court, but it is complained that the state court did not act in a particular way upon the applications made to it for action.

At the January, 1905 term and eight days following the filing of motions for substitution, etc., the plaintiffs in that court filed their objections to the motion for substitution, therein claiming that the individuals John R. McLaughlin

and James B. McLaunghlin were not entitled to file or make a motion for substitution: that they showed no legal reason or ground therefor. That the said John R. McLaughlin and James B. McLaughlin were not parties to the action and were not named or joined as defendants and were mere interlopers in making or filing the motion filed by them. That the plaintiffs were entitled to bring their action solely against the co-partnership of McLaughlin Bros., and having exercised such right and option, the individual members were not entitled to be joined as parties or substituted as parties. (R. 11-12.)

Many other grounds were urged, including the claim that as the debt sued for was one for which the co-partnership was liable and as the firm was a legal entity under the Iowa statutes, the firm property could be taken and devoted to the payment of the firm debt without the presence of the individual members or without any judgment against them, and claiming that the election and option to so maintain their action and enforce their debt against the co-partnership was given to the plaintiffs by the Iowa statute. (R. pp. 11-12.)

At the subsequent term of court held in March, 1905, the petition for removal appearing to have lain dormant, objections thereto were filed by the plaintiffs, claiming as distinct grounds:

1. That the petition failed to show a compliance with the provisions of the Federal statute and Acts of Congress, entitling the said defendants to a removal of said cause.

2. That the petition for removal was filed too late and not filed within the time that the defendants were required by the statutes and rules of practice in the State of Iowa to appear and answer in said cause.

3. That the record in the case affirmatively showed that the defendants were not entitled to the removal of the cause to the United States Circuit Court as prayed in said petition.

4. That the petition for removal was not filed, nor the said application for removal made by the sole party defendant in the cause, but was made by certain persons not parties to the suit and not entitled or authorized by law to apply for or to secure the removal of said cause.

5. That the record in the cause affirmatively showed that the suit was brought and was pending in the District Court of the State of Iowa in and for Pocahontas County, at the January, 1904 term of said court; that the suit was brought against McLaughlin Brothers, a co-partnership as sole defendant; and that said McLaughlin Bros. appeared at said January, 1904 term of said court. That the said defendants were required to answer at said term of court and by virtue of process and appearance in any event, not later than at the March term, 1904, of said court. That three several terms and more than nine months have elapsed since the time when by the statutes of Iowa and the rules of practice in such court, the said defendants were required to appear and answer in said cause.

6. That the record in the cause affirmatively showed that there was no diversity of citizenship which entitled the removal of the cause to the United States Circuit Court. (R. pp. 12-13.)

Subsequently the motions for substitution were caused to be presented by the defendant's counsel, and argued to the state court, and such motions were denied and the petition for removal, so styled, was presented and the exceptions thereto sustained. (R. p. 13.)

The cause thereafter proceeded to trial as an action against McLaughlin Bros., a co-partnership, sole defendant, resulting on Oct. 20, 1905, in a directed verdict in favor of said defendant.

From this order directing a verdict, an appeal was taken to the Supreme Court of Iowa on Dec. 26, 1905, and on the

8th day of April 1907, said cause was decided in favor of the appellants and was remanded to the District Court for a new trial, a procedendo being filed on Nov. 25, 1907. Thereafter the cause was tried a second time in the state court and the trial concluded on the 24th of January, 1908, resulting in a verdict and judgment in favor of the plaintiffs, from which the appeal was prosecuted upon the part of the defendant to the Supreme Court of Iowa, resulting in the decision from which this writ of error is prosecuted.

The decision from which this writ is prosecuted considers and decides but one question, namely: Were the parties entitled to have John R. McLaughlin and James B. McLaughlin substituted for the defendant McLaughlin Bros., whom plaintiffs elected to sue? The opinion in the case decided by the Iowa Supreme court declares that no question except this one question is involved. The facts stated as the basis for the decision, refer alone to the situation which arose upon the filing of this application for substitution. It is not even stated in the opinion that a second petition for removal was filed. The reference in the concluding sentence of the opinion to the right of plaintiffs to sue McLaughlin Bros. alone in the federal court, is intended to call attention to the ground upon which the United States Circuit Court once remanded the case to the state court and has no reference whatever to the filing of a second petition for removal, or the action of the Pocahontas District Court thereon.

BRIEF OF ARGUMENT.

I.

1. By filing, presenting and arguing the same, the plaintiffs in error asked the state court to rule on the motion and application for substitution of parties. This request they

pressed upon the state court notwithstanding the contemporaneous filing of a petition for removal in the name of individuals not parties to the record. They thereby estopped themselves from now claiming that when the second petition for removal was filed, the state court lost jurisdiction to proceed further in the cause.

The plaintiffs in error failed to have the record show they desired the motion and application for substitution of parties to be disregarded, and failed to present the petition for removal; thereby they waived the right to removal, if one existed.

Hudson River Railroad & Terminal Co. vs. Day, 54 Fed. Rep. 545, 546-7;
Amy vs. Manning, 144 Mass. 153.

2. Even if it were true that the plaintiffs in error had an actual right of removal at the time of filing the petition in January, 1905, they did not stand upon such right, but invoked the jurisdiction of the state court to decide upon other questions in the case, and by such conduct in effect withdrew the petition for removal.

Mays vs. Newlin, 143 Fed. Rep. 574, 577;
Springer vs. Howes, 69 Fed. Rep. 849, 851.

II.

The second petition for removal was not presented to the state court for action; on the contrary, the record shows that such petition was filed by John R. McLaughlin and James B. McLaughlin, alone; that there were filed contemporaneously with it, a motion and application for the substitution of these individuals as parties defendant, thereby conceding that they were not yet parties. The action of the state court was invoked, not to consider the petition for removal, but to con-

sider the motion and application for substitution. The failure to present this petition for removal, while asking the state court to retain jurisdiction to rule upon the other motion and application, is fatal to the claim that the case was by filing such petition for removal, removed into the federal court.

The petition should have been presented to the state court, and that court given an opportunity to act, if such claim was to be made.

Higson vs. North River Insurance Co., 184 Fed. Rep. 165, 168-9;

Roberts vs. Chicago St. P. M. & O. Ry. Co., 45 Fed. Rep. 433;

(Affirmed upon appeal to this court, *Chicago, St. Paul M. & O. Ry. Co. vs. Roberts*, 141 U. S. 690.);

Remington vs. Central Pacific Ry. Co., 198 U. S. 95.

III.

1. The order of the United States Circuit Court, remanding the cause to the state court, is conclusive that the cause was not removable, and such order of the United States Circuit Court is binding upon the parties and the State Court as an adjudication.

Missouri Pacific Ry. Co. vs. Fitzgerald, 160 U. S. 556;

Powers vs. Chesapeake & Ohio Ry. Co., 169 U. S. 92.

2. The state court is given no right to review or control the exercise of the jurisdiction of the Federal Court, and the decision of the Federal Court upon a petition for removal cannot be ignored in the state court. The state court is bound

to give the effect of a judgment to the order of the United States Circuit Court upon the motion to remand. It is not necessary to determine whether the case is removable or not; the Federal Court is given jurisdiction to determine that question and its judgment is conclusive.

Chesapeake & Ohio Ry. Co. vs. McCabe, 213 U. S. 207;
18 Enc. of Pl. & Pr., 385.

3. There was no right to file a second petition for removal; the Federal Circuit Court having passed upon the first petition, the state court was absolutely bound by its decision.

St. Paul etc. Ry. Co. vs. McLean, 108 U. S. 212;
Smith vs. Travelers Insurance Co., 73 Fed. Rep. 513.

4. The fact that the first petition may have been defective does not alter this rule.

Johnston vs. Dowan, 30 Fed. Rep. 395, 396;
Overman Wheel Co. vs. Pope Mfg. Co., 46 Fed. Rep. 577, 580;
Nichols vs. Stevens, 123 Mo. 96;
State of Texas vs. Day Land & Cattle Co., 49 Fed. Rep. 593, 595.

5. Even if the court had ordered over the objections of the plaintiff in the case, the substitution of defendants as prayed for by the plaintiffs in error, this would not have given a right to a second removal of the case.

Whitcomb vs. Smithson, 175 U. S. 635.

IV.

1. In the suit as originally brought, a writ of attachment was issued and garnishment proceedings were had under the writ. The defendant, McLaughlin Bros. had such in-

formation of the proceedings as enabled it to appear on the first day of the term and file the first petition for removal. Thereafter, either the state or the federal court would have had jurisdiction without the service of any Original Notice, even under the Federal Court rule to condemn the attached property to the payment of the indebtedness.

Clark vs. Wells, 203 U. S. 164.

2. If the only defect in reference to the proceedings of which complaint could be made, was that the notice required in order to proceed in the Federal Court was not given, the remedy would not be a remand of the case, but a dismissal of it.

Lawrence vs. Southern Pacific Ry. Co., 180 Fed. Rep. 822, 831;
Wabash Western Ry. Co. vs. Brow, 164 U. S. 271, 277;
Goldey vs. Morning News, 156 U. S. 518;
18 *Enc. Pl. & Pr.* 359;
Calderhead vs. Downing, 103 Fed. Rep. 27, 30.

3. The plaintiffs in error never supposed that the cause was actually remanded to the state court either because of a failure to have the transcript show the service of notice, or because of a failure to serve notice. They recited in the motion for substitution filed: "That the only effect of maintaining this action against these defendants in their partnership name *is to prevent a removal of the action to the said United States Circuit Court.*" They therefore knew the case was remanded upon authority of *Ralya Market Co. vs. Armour & Co.,* 102 Fed. Rep. 530. See the statement of the judge who made the order remanding the case in a subsequent case.

Bruett & Co. vs. F. C. Austin Drainage Excavator Co., 174 Fed. Rep. 668, 672.

V.

1. Under the state statute (as applied to any matters arising in the state court), there was an appearance which was a general appearance for all purposes when the petition for removal was filed in January 1904.

Iowa Code, Sec. 3541.

2. The State Legislature of Iowa had the right to provide as it did that "an appearance even though specially made * * * for any purpose connected with the cause * * * shall render any further notice unnecessary." And the procedure in the state court is controlled by this statute.

York vs. Texas, 137 U. S. 15.

3. The effect of this statute is to absolutely abolish special appearances. A party filing any paper in the cause is held by the state court to have entered a general appearance.

Lesure Lumber Co. vs. Mutual Fire Insurance Co., 101 Iowa, 514, 519;

Locke vs. Chicago Chronicle Co., 107 Iowa, 390, 395;

Johnson vs. Tostevin, 60 Iowa, 46, 47;

Rummelhart vs. Boone, 126 N. W. 338, 339.

4. The Missouri Supreme Court and the Iowa Supreme Court are alike in holding that the filing of a motion for a change of venue or any similar paper is an appearance in the cause.

Julian vs. Kansas City Star, 209 Mo. 35;

Feedler vs. Schroeder, 59 Mo. 364;

Post vs. Brownell & Co., 36 Iowa, 497.

5. And where the appearance is in order to file a petition for removal which for any purpose is not effective, such ap-

pearance will be held in the state court to be a general appearance from the date of the filing of such petition.

State ex rel, Texas Portland Cement Co. vs. Sale, 232 Mo. 166.

6. There is no doubt under the rule in the Federal Court that the filing of the petition for removal is an appearance "to a qualified extent."

Clark vs. Wells, 203 U. S. 164, 171.

7. This qualified appearance becomes by reason of the state statute applied to the practice in the state courts, a general appearance. The state court upon the remanding of the case was bound to consider all such questions in accordance with state practice and not in accordance with the federal practice. Statutes prescribing such rules of practice are valid, although not binding upon the Federal court.

Mexican Central Ry. Co. vs. Pinkney, 149 U. S. 194.

8. Even in the federal court, the appearance for the purpose of filing a petition for removal is regarded as an acknowledgment by the defendant who so appears that he has actual knowledge and warning of the proceedings, thus authorizing the enforcement of a judgment against attached property. So that even under the federal court rule, the state court was not bound to give any other notice of the proceeding against the attached property.

Clark vs. Wells, 203 U. S. 164.

VI.

1. The assignment of errors includes many charges and claims of error, going far beyond any question properly in

the case. Such assignments are unvailable for the purpose of showing the decision of a federal question.

Fowler vs. Lamson, 164 U. S. 252;
Missouri Pacific Ry. Co. vs. Fitzgerald, 160 U. S. 556;
Chicago I. & L. R. Co. vs. McGuire, 196 U. S. 127.

2. The sole question which was passed upon or presented to the state court as shown by the record and the decision, was the right to substitution of parties. This involved no federal question, and there is nothing properly presented for review in this court.

Waters Pierce Oil Co. vs. Texas, 212 U. S. 112.

3. No question is presented save a mere matter of procedure. The reference by the state court to the right of removal *was a mere reference to a question which it assumed had been passed upon the United States Circuit Court upon the first petition for removal.* The matter was presented at all to the state court in an attempt to reverse the case because the lower court did not order the substitution of parties which it was represented would have been effective to authorize the granting of the second petition for removal.

Whether this would or would not result, was neither presented to that court for decision, nor was it necessary to the determination of the appeal; it was not actually decided and the case is not one where it was necessary that the court should decide it in order to give the judgment or make the decision in the case. There is therefore presented no single ground upon which to rest the claim that a federal question is presented for decision.

First National Bank vs. Estherville, 215 U. S. 341;
Cincinnati etc. Ry. Co. vs. Slade, 216 U. S. 78.

4. The granting of the application for substitution of parties would not have a controlling effect in making the case a removable one.

Thomas vs. Board of Trustees, 195 U. S. 207.

5. The claims that the state court ruled upon the right of removal or held that the statute was not limited or controlled by the Constitution of the United States, and various other assignments of error are wholly without basis in the record.

VII.

Neither petition for removal showed or charged that either the plaintiffs or the defendants were inhabitants of the Northern District of Iowa; upon this ground also, the petitions for removal were properly disregarded.

Ex parte Wisner, 203 U. S. 449;

Turk vs. Illinois Central Rd. Co., 193 Fed. Rep. 252, 254;

Jackson vs. Hooper, 188 Fed. Rep. 509;

Gruetter vs. Cumberland Telephone & Telegraph Co., 181 Fed. Rep. 248, 255.

ARGUMENT.

I.

The plaintiffs in error contemporaneous with the filing of their second "petition for removal", filed an application and a motion in which the state court was asked to take action. It can not be pretended that this application and motion were filed without a purpose to invoke the jurisdiction of the state court. No other court could pass upon them. They are

phrased in language which conclusively shows they were designed to obtain action from the state court and not from the Federal court.

They were not promptly presented to the state court for decision. The term at which these papers were filed, passed, and the second term was reached before the court was finally asked to pass upon the motion and application. Following the second term they were presented by agreement in vacation and were then overruled.

Subsequently, a trial was had in the state court, a verdict directed for the defendants and the cause appealed to the Iowa supreme court. After reversal, the case was again tried and plaintiffs recovered judgment, which judgment the Supreme Court affirmed. If the position is now taken that the petition for removal and bond filed in January, 1905, were effectual to transfer jurisdiction to the United States Circuit Court, then what, may we ask, was the object in filing the motions for substitution?

It would seem to be quite inconsistent to claim that the state court should have treated the petition for removal as effective—in which case it should have proceeded no further—and to also claim that the state court was guilty of error in not making a certain ruling which could only be made by disregarding the petition for removal.

Just such a situation was presented as arose in the case of *Amy vs. Manning*, 144 Mass. 153; 10 N. E. 737, 742-3, where it was held:

"It is evident that the defendant voluntarily took two inconsistent positions before the court at the time when he filed the petition to remove the action,—one that the court should retain jurisdiction over the action for the purpose of hearing and determining his motion to dismiss and his plea in abatement, and the other that the court should cease to exercise jurisdiction over the action except to remove it to the circuit

court of the United States; and he maintained these positions until after the court refused to dismiss the suit. The defendant, apparently, at the time he filed the petition for removal, did not absolutely desire that the suit should be removed, but wished still to try the chances of a favorable decision by the state court upon his motion to dismiss and his plea in abatement. It is not necessary to decide whether the petition, construed, as it must be, in connection with the motion which accompanied it, ought not to have been dismissed as inconsistent with the provisions of the statute of the United States. If such a petition could be retained, this could be done only that the defendant might thereafter bring it to the attention of the court, and he should have done this when his motion to dismiss and his plea in abatement were overruled. If the application had been made at that time, we do not see how it could have taken effect as of the date of the filing of the petition, because, having asked the decision of the court upon his motion to dismiss and his plea in abatement, he ought not to be permitted to avoid the decision by a removal, which should take effect, by relation, as of a time anterior to the decision. After the motion to dismiss and the plea had been overruled, another state of facts existed. The court had decided that it had jurisdiction over the person of the defendant, the case was ready for trial, and the term was one at which it could be tried, and the defendant should have presented his petition to the court at that term. 'One of the objects of the act of 1875 was to prevent the abuses which have been practiced under the acts of 1866 and 1867, which allowed a removal at any time before the final hearing.' *Murray vs. Holden McCrary*, 341 2 Fed. Rep. 740; *Pullman Palace Car Co. vs. Speck, supra.*

The defendant, in effect, filed an alternative petition to the court, asking it either to dismiss the action or to remove it. After the petition was filed, the court denied the motion to

dismiss, but, without some action by the defendant, the court could not know that he insisted upon the removal; and if the defendant desired that the petition should be considered by the court as an absolute petition for removal he should have informed the court of this."

The correctness of this ruling was recognized in a case in the United States Circuit Court for New Jersey, that of *Hudson River Railroad & Terminal Co. vs. Day*, 54 Fed. R. 545, 546-7, where on a simliar state of facts it was held:

"The second reason assigned is much more cogent. It is admitted that, at the very time Mr. Day filed his petition for removal in the circuit court of Bergen county, he obtained from the supreme court, or from a justice of the supreme court, a writ of certiorari directed to the Bergen county court, requiring that court to send up all the record and proceedings which had theretofore been had in the cause, that they might be reviewed by the supreme court sitting in banc; that the proceedings and record have been sent, in obedience to the writ, to the supreme court, and a review has been had, both parties being represented by counsel. The argument on the certiorari took place before the supreme court months after the filing of the petition for removal of the controversy to this court. I think that Mr. Day, in choosing the state tribunal for the protection of his rights, has waived his right to remove his cause to the federal tribunal. He cannot proceed tentatively in either court. He must make his selection. If he chooses to rest the protection of his rights with the state tribunal, he cannot afterwards seek to delay or embarrass the final determination of his case by appealing to the federal tribunal."

The plaintiffs in error were in a position where they must either claim the petition for removal was effective, in which event their present claim must be that the state court erred in proceeding at all; or they must claim that the state court

properly disregarded the petition for removal but erred in failing to sustain the motions for substitution of parties. The plaintiffs in error could not properly invoke the jurisdiction of both courts to decide questions which could properly be before but one court for determination. In reference to such a situation, it was said by the circuit court for North Carolina in the case of *Springer vs. Howes,* 69 Fed. Rep. 849, 851:

"It seems to me proper that when a party to a litigation has deliberately and voluntarily intrusted a matter, which either of two tribunals has a right to decide, to one of them, he should not be allowed, in case of an adverse decision, to resort to the other. A defendant seeking to remove a case from a state to a federal court, if he applies to a state judge for an order, does so by his own choice. If the superior court of Beaufort county had decided the matter without having been asked by the parties seeking to remove, to do so, a different question would have been presented."

The plaintiffs in error cannot rightfully claim that the petitions for removal, either that originally filed in January, 1904, or that filed in January, 1905, could be treated as lying dormant while the state court properly proceeded and to become effective whenever the plaintiffs in error chose to demand action upon such petition for removal.

Upon the remanding of the case the first petition could not be the basis for a further attempt to reverse the case.

"If the interlined complaint shows a right of action arising under federal laws, then, beyond all controversy, the amended complaint before it was interlined showed a right of action of the same character; and the same statement may be made with reference to the original complaint of February federal question, but stated a cause of action at common law for deceit. *Bailey vs. Mosher,* (C. C.) 74 Fed. 15. Realizing apparently, that the second application for a removal of the

cause was made too late, for the reasons already stated, counsel for the defendants have suggested that inasmuch as the original petition for removal, which was filed on March 29, 1895, remained on file, it operated *proprio vigore* to oust the jurisdiction of the state court as soon as the amended declaration was filed. This suggestion assumes, of course, that the second complaint differed from the first or original complaint as respects the cause of action stated therein, which assumption, in our judgment, is erroneous. We are unable to discover any difference in the cause of action stated in the two complaints. But, aside from this view of the case, we are of opinion that the original petition for removal was *functus officio* when the case was originally removed and remanded, and that it could not have any effect upon a subsequent amended complaint filed in the case, even if the latter did state a different cause of action arising under federal laws. If such a complaint was filed after the cause was remanded to the state court, it was the duty of the defendants to have prepared and filed a second petition and bond for removal addressed to the new or amended complaint, and to have prepared and filed such petition and bond within the period heretofore indicated.

Jones vs. Mosher, 107 Fed. Rep. 561, 564-5.

Plaintiffs in error having filed the second petition for removal, but continuing to demand from the state court the exercise of its jurisdiction, have estopped themselves from claiming that the second petition should have been regarded by the state court as depriving it of jurisdiction. When finally presented to the state court, it was properly denied because if it could have been effectual for any purpose, it was presented too late.

A party to a suit may be estopped by his conduct from claiming rights which otherwise were open to him. Even if

it should be conceded that there was an actual right of removal at the time of the filing of the petition in January, 1905, yet if the plaintiffs in error did not rest upon such right, but proceeded to take such steps in the state court as invoked its jurisdiction and acquiesced in the failure to transfer the record a second time to the Federal court, they would be bound by that conduct. Such conduct would amount to a withdrawal of the petition for removal.

In the case of *Mays vs. Newlin*, District Judge McDowell of the Western District of Virginia said: (143 Fed. Rep. 574, 577-8.)

"Upon the refusal of that court to accept the petition and bond, counsel for defendant had the right to have the record transcribed and forthwith filed in this court. The failure so to do seems to me necessarily an acceptance of the action of the corporation court. It was an election to leave undisturbed the jurisdiction of that court until the cause should be placed on the docket and again called to the attention of the court at the June term. Such action was a temporary withdrawal of the motion to remove."

If the petition to remove be treated as withdrawn or suspended until the motions to substitute were ruled upon, it is obvious that it was presented too late.

II.

The petition for removal seems never to have been presented to the state court for action. There is some controversy in regard to the necessity for so presenting such petition to the state court in the ordinary case of removal. In the usual case of removal upon the ground of diversity of citizenship, where the defendants seeking removal do not invoke the jurisdiction of the state court, except as that jurisdiction is challenged by the petition and bond for removal,

there may be sound reason for saying that the removal is accomplished by the filing in the state court of a proper petition and bond. But it seems to us that that rule is not one of universal application even if it be granted that it may be applied in the ordinary case, which is itself a mooted question.

The language of the act seems to contemplate more than a mere filing. The state court may be required in every case to pass upon the sufficiency of the petition and the bond. This right of the party and duty of the court is emphasized where the Federal court has once remanded the cause and the defendant is seeking a second removal. Surely the time must come when the state court could properly say that it could not permit its right to proceed in the cause to be trifled with by the repeated filing of petitions for removal, which it was conclusively adjudicated by the Federal court, were insufficient to accomplish the removal of the cause from the state court. We contend that in such a case the state court is not bound to investigate its files to ascertain whether a second petition for removal has not been filed.

It seems to be frequently held that there is an absolute necessity of presenting the petition for removal in every case.

In the case of *Higson vs. North River Insurance Co.*, 184 Fed. R. 165, 168-9, the rule was stated by District Judge Connor as follows:

"It seems clear that the order of January 24, 1910, was ineffectual to deprive the state court of its jurisdiction. The statute (Act Aug. 13, 1888, c. 866, #1, 25 Stat. 435; 4 Fed. Stat. Ann. 349, (U. S. Comp. St. 1901, p. 510), by which the power to remove is conferred, requires the petition and bond to be filed, in the first instance, in the state court. 'The petition for removal must be presented to the state court, accompanied by a bond to entitle the petitioner to remove. The removal cannot be granted on petition to the Circuit Court.'

Simonton, Circuit Judge (4th Circuit) in *Mayo vs. Dockery*, (C. C.) 108 Fed. 899. The case therefore remained in the state court, unless by filing the petition and bond in the office of the clerk of the superior court on April 23, 1910, it was removed. Two objections are urged to this petition: That simply filing the petition and bond, with the clerk was not a compliance with the provisions of the statute; that they should have been presented to the judge presiding so that he might pass upon their sufficiency. Several of the federal judges have so held, and it would seem correctly. Unless the attention of the judge of the state court is called to the petition and bond, how is it possible for him to grant or refuse the petition to remove? It is certainly proper to present the petition to the judge and is the usual and approved practice."

"The correct practice is indicated by Judge Gresham in *Shedd vs. Fuller*, 36 Fed. Rep. 609. The petition should be presented to the state court, and opportunity given that court to act."

(*Roberts vs. Chicago, St. P., M. & O. Ry. Co.*, 45 Fed. Rep. 433.)

The case last cited was affirmed upon appeal to this court. *Chicago, St. P., M. & O. Ry. Co. vs. Roberts*, 141 U. S. 690, 35 L. Ed. 905.

See also *Loop vs. Winters' Estate*, 115 Fed. R. 362.

The following dicta appears in the case of *Remington vs. Central Pacific Ry. Co.*, 198 U. S. 95, 49 L. Ed. 959, 963:

"The presenting of the petition to a judge in chambers, and the filing of it in the state court, satisfied the statute."

In the case at bar, the state court was certainly asked to admit new parties both on and after the date of filing the petition for removal. The party invoking such action, if action upon the petition for removal was expected should have presented such petition to the state court.

III.

The plaintiffs in error are not entitled to present to this court any claim of error because of the determination of the United States Circuit Court upon the motion to remand ruled upon in that court. The plaintiffs in error have no right to challenge that ruling. This has been clearly held in a series of decisions made by his tribunal.

In the case of *Missouri Pacific Ry. Co. vs. Fitzgerald*, 160 U. S. 556, 40 L. Ed. 536, 542, which was a writ of error to the Supreme Court of the state of Nebraska, it was held:

"We are thus brought to the remaining and most important question arising on this motion.

Under the act of Congress of March 3, 1887 (24 Stat. at L. 552, 553, chap. 373), as re-enacted for the purpose of correcting the enrollment, by the act of August 13, 1888 (25 Stat. at L. 433, 435, chap. 866), is the order of the circuit court remanding the cause to the state court open to review on this writ of error? If not, then we cannot take jurisdiction to revise the proceedings of the state court. Nor can the inquiry be affected by the fact that a motion to remand had been previously made and denied. That order was subject to reconsideration, as the question of jurisdiction always is, until final judgment, and, indeed, it was the duty of the circuit court under the statute, if it appeared at any time that jurisdiction was lacking, to dismiss or remand as justice might require. 18 Stat. at L. 470, chap. 137, *5."

The court then discussed the provisions of the act of 1875 and determined the effect of Sec. 6 of the act of March 3, 1887, repealing the earlier section, as well as the last paragraph of Sec. 2, expressly declaring that no appeal or writ of error from the decision of the circuit court remanding the case should be allowed. After reviewing previous declarations, it was held:

"We see no reason for reconsidering these conclusions and it may be regarded as settled that an order of the circuit court remanding a cause cannot be reviewed in this court by any direct proceedings for that purpose."

In the case of *Powers vs. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 42 L. Ed. 673, 675, it was held:

"But it is unnecessary now to consider which of the views of the circuit court upon this question is the correct one, because that court, by its order remanding this case, distinctly and finally adjudged, as between these parties and for the purposes of this case, that, at the time of the filing of the first petition for removal, the case was not removable, because, as it then stood, some of the defendants were citizens of the same state with the plaintiff, and there was no separate controversy between the plaintiff and the railway company, a citizen of a different state from himself. That order is not reviewable by this court. *Gurnee vs. Patrick County*, 137 U. S. 141 (34, 601); *Ex parte Pennsylvania Co.*, 137 U. S. 451 (34, 738); *Birdseye vs. Shaeffer*, 140 U. S. 117 (35, 402); *Missouri Pacific Railway Co. vs. Fitzgerald*, 160 U. S. 556 (40, 536.)"

The case of *Nelson vs. Moloney*, 174 U. S. 164, 43 L. Ed. 935, 936, was a writ of error to the Court of last resort of the state of New York, and quoting with approval from the case of *Missouri Pacific Ry. Co. vs. Fitzgerald, supra*, it was distinctly held that the state court cannot be said to have decided against a federal right when it is the circuit court and not the state court which denies the right complained of, the court saying:

"In *Missouri Pacific Railway Co. vs. Fitzgerald*, 160 U. S. 556, 582 (40; 536, 543), we held that, 'if the circuit court remands a cause and the state court thereupon proceeds to final judgment, the action of the circuit court is not reviewable on writ of error to such judgment. A state court cannot

be held to have decided against a Federal right, when it is the circuit court, and not the state court, which has denied its possession. * * * As under the statute a remanding order of the circuit court is not reviewable by this court on appeal or writ of error from or to that court, so it would seem to follow that it cannot be reviewed on writ of error to a state court, the prohibition being that "no appeal or writ of error from the decision of a circuit court remanding such cause shall be allowed." ' "

We contend that it follows from these rulings that the state court is not to be reversed for having treated the order remanding the case as in effect an adjudication between the parties; or for its refusal to permit plaintiffs in error to bandy the case back and forth between the state court and the United States circuit court. It was not pretended at the time of the filing of the second petition for removal that the plaintiffs in error had any other or different right of removal than that which had already been denied by the federal court, save in so far as they contended that the substitution of the individuals for the co-partnership as the party defendant in the state court might authorize a right of removal which was not theretofore authorized.

Even if it could be said that the state court should have granted a second petition for removal upon grounds identical with these already determined by the Federal Court to be insufficient, it cannot be said that the state court committed error in denying the petition for removal. Indeed, the only assignments of error in this case which are properly presented, are those which involve not the action of the state court in refusing to again send the case to the United States circuit court, *but rather its refusal to permit the individuals to appear in the place of the co-partnership defendant.* Because this is the only question presented to and passed upon by Iowa Supreme Court.

The plaintiffs in error have seen fit to omit from the record the assignments of error urged in the state Supreme Court. They must therefore be presumed to be satisfied with that part of the opinion of the Iowa Supreme Court, which defines the questions presented for decision. In unmistakable terms, it is declared in that opinion that the sole question presented was the right of defendants to have John R. McLaughlin and James B. McLaughlin substituted for McLaughlin Brothers. (R. pp. 41-42.) True, the court mentions the right of removal, but not as a question for decision by that court. It may very well be supposed that the Iowa court assumed as did counsel for plaintiffs in error, that the decision of the United States Circuit Court was conclusive unless the parties were changed by the substitution applied for.

Plaintiffs in error do not complain of the statement in the state court decision that *but one question* is considered or decided. *That question pertains wholly to a rule of practice in the state court in regard to the substitution of parties.* The claim that the Iowa Supreme Court decided that the case was not one that could be removed to the Federal Court because the provisions of the Iowa Code is not justified by anything in the decision or the record.

The state courts as well as the plaintiffs in error assumed that the decision on the first petition for removal by the United States Circuit Court was conclusive on the right to remove the case unless there was a substitution of parties. We think counsel for plaintiffs in error were correct in their first position and are wrong now in claiming there was any right to a second removal of the case.

In the case of *Whitcomb vs. Smithson*, 175 U. S. 635, 44 L. Ed. 303, 305, it appears that a motion to remand had once been sustained upon the ground there was no separable controversy between certain defendants who were joined in

the original complaint. Subsequently certain of the defendants were dismissed from the suit, leaving as sole defendants, citizens of another state, and making a removable cause. This dismissal was made by order of the trial court but against the protests of the complainant in the suit. It was held that this gave no right to a second removal, the court saying:

"The contention here is that when the trial court determined to direct a verdict in favor of the Chicago, Great Western Railway Company, the result was that the case stood as if the receivers had been sole defendants, and that they then acquired a right of removal which was not concluded by the previous action of the circuit court. This might have been so if when the cause was called for trial in the state court plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all the defendants. *Powers vs. Chesapeake & O. R. Co.*, 169 U. S. 92, 42 L. Ed. 673, 18 Sup. Ct. Rep. 264. But that is not this case. The joint liability was insisted on here to the close of the trial, and the non-liability of the railway company was ruled in invitum."

And referring to the ruling upon the merits against plaintiff's objections discontinuing the cause as against certain of the defendants, the court said:

"This was a ruling on the merits, and not a ruling on question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable and thereby to enable the other defendant to prevent plaintiff from taking a verdict against them. The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried. As we have said, the contention that the railway company was fraudulently

joined as a defendant, *had been disposed of by the circuit court.*" (Italics ours.)

Under this rule we have the right to claim that even if the state court had over the objections of plaintiff ordered a substitution of parties this would not have authorized a second removal of the case.

The case at bar having been remanded to the state court, that court was confronted with the question of deciding what action should be taken upon the second petition for removal. If the decision of the Federal court constituted an adjudication as to the right of removal, then the State Court at the time the second petition was filed, was bound to respect such decision. It would be necessary for a change in the status of the parties to appear, essentially altering such status before the state court would have the right to recognize a second petition for removal.

This is clearly held in the case of *Chesapeake & O. R. Co. vs. McCabe*, 213 U. S. 207, 53 L. Ed. 765, 770. In that case the court considered whether or not, assuming the decision made by the United States Circuit Court to have been erroneous, the same constituted a binding adjudication to which the state court was bound to give effect, even though that decision was wrong, and it was said:

"Conceding that, except for the principle of comity, the state court may decide the question of jurisdiction for itself, in the absence of an injunction from the Federal court in aid of its own jurisdiction, or a writ of certiorari requiring the state court to surrender the record under the act of 1875, is the state court obliged to give effect to the judgment of the United States circuit court, from which no writ of error is taken, and rendered in the Federal court after it has sustained its own jurisdiction and refused to remand the action?

In view of the fact that the question is a Federal one, and that the state court is given no right to review or con-

trol the exercise of the jurisdiction of the Federal court, we think that such Federal judgment cannot be ignored in the state court as one absolutely void for want of jurisdiction, and that such judgment, until reversed by a proper proceeding in this court, is binding upon the parties, and must be given force when set up in the action. This view is sustained in the former decisions of this court upon the subject."

After reviewing the authorities upon the question, this court concluded:

"Applying these principles to the case at bar, we think the state court erred in refusing to give effect to the judgment set up in the answer offered in the state court. When the application for removal was made in the state circuit court, that court held the case removable, and the record was filed in the Federal court. Afterwards that court, upon the application of the plaintiff, refused to remand the suit, and proceeded to a final determination thereof, and rendered judgment accordingly.

It is not necessary to determine whether the case was removable or not. The Federal court was given jurisdiction to determine that question, it did determine it, and its judgment was conclusive upon the parties before it until reversed by a proper proceeding in this court."

There was no right to file a second petition for removal; the Federal circuit court having passed upon the first petition, the state court was absolutely bound by its decision.

In the case of *St. Paul & C. Ry. Co. vs. McLean,* 108 U. S. 212, 27 L. Ed. 703, 705, this court held:

"Assuming that the second petition for removal was filed before or at the Term at which the cause could have been tried in the State Court, we are of opinion that a party is not entitled, under existing laws, to file a second petition for the removal upon the same grounds, where, upon the first removal by the same party, the Federal Court declined to

proceed and remanded the suit, because of his failure to file the required copy within the time fixed by the statute. When the Circuit Court first remanded the cause, the order to that effect not being superseded, the State Court was re-invested with jurisdiction, which could not be defeated by another removal upon the same grounds and by the same party. A different construction of the statute, it can be readily seen, might work injurious delays in the preparation and trial of causes."

"In *Railroad Co. vs. McLean*, 108 U. S. 212, 2 Sup. Ct. 498, the supreme court distinctly ruled that if, upon the first removal, the federal court declines to proceed, and remands the cause, because of the failure to file a copy of the record in due time, the same party is not entitled to file in the state court a second petition for removal upon the same ground. In *Johnston vs. Donvan*, 30 Fed. 395, this principle was applied to a second removal upon the ground of diverse citizenship."

(*Smith vs. Travelers' Insurance Co.*, 73 Fed. Rep. 513.)

The fact that the first petition is defective does not alter the case. It cannot be successfully urged that the first petition being defective, there has been no petition for removal filed, and hence that the second petition is really a first attempt at removal. Where the first petition was so defective and a second petition for removal was filed it has been held by one of the District Judges in *Johnson vs. Donvan*, 30 Fed. Rep. 395-6:

"The plaintiff has moved to remand again, because, as he claims, a second removal on the same grounds is not allowable. The defendants insist that the former petition was so defective that it did not really effect a removal, and that, therefore, this is the only removal, and not a second removal.

The former petition did, however, bring the cause into this court, and within its jurisdiction, so that a motion to remand was necessary. If the former motion to remand had not been made, this court would have properly retained the case. *Davies vs. Lathrop*, 13 Fed. Rep. 565; *Edwards vs. Connecticut Mut. Life Ins. Co.*, 20 Fed. Rep. 452. The former motion to remand was therefore properly before this court, and its decision upon it was *conclusive*, except upon appeal. The defendants' right of removal was involved upon such proceedings as the defendants chose to take that brought it in question. That right was adjudicated and settled, and could not again be brought in question upon new proceedings. *Railway Co. vs. McLean*, 108 U. S. 212."

This is the rule prevailing generally and which necessarily follows from the decisions of this court.

See also *Overman Wheel Co. vs. Pope Manufacturing Co.*, 46 Fed. Rep. 577, 580.

Nichols vs. Stevens, 123 Mo. 96, 45 Am. State Rep. 514, 526;

State of Texas vs. Day Land & Cattle Co., 49 Fed. Rep. 593, 595.

It was not only the right of the state court to proceed as though no removal had been attempted after the remand of the case by the Federal court, but its duty to so proceed was imperative. The validity of the removal proceeding could not be re-examined in the state court or its own jurisdiction questioned. There is no court which had the right to pronounce the petition for removal sufficient after the Federal circuit court had pronounced it insufficient. See 18 Enc. Pl. & Pr. 385.

Counsel for plaintiffs in error appreciated this rule at the time of filing the motion and application for substitution of parties. This was an ingenious attempt to obtain the right

to invoke the jurisdiction of the courts to consider a second petition for removal. That counsel for plaintiffs in error so understood the rights of his clients is apparent from the fact that the motion and application asking the state court to take action—and necessarily to retain jurisdiction for that purpose—were filed contemporaneous with the second petition for removal. Necessarily it was not then intended to claim that the state court lost jurisdiction by the filing of that petition for removal.

IV.

A great deal of stress is put by the plaintiffs in error upon the statement found in the certified copy of the order remanding the cause to the District Court of Pocahontas County, Iowa. It will be noticed that the copy of this order referring to the motion to remand first recites: "The court being advised in the premises finds that this court has not jurisdiction of said cause and sustains said motion."

Further on in the order there is contained the statement: "This court not having jurisdiction by reason of lack of evidence in the transcript filed herein that said defendant has been served with notice of said proceedings." (Record, p. 8.)

Counsel for the plaintiffs in error now asserts that this certificate shows that the cause was remanded for a specific reason only, to wit: Not because of *lack of evidence in the transcript* filed—but because as it is charged, there was, in fact, no notice served; and it is the theory of the plaintiffs in error that a different situation was presented when the second petition for removal was filed. But it may readily be seen that another transcript would equally fail to contain any evidence of the service of notice upon the defendant.

So that it may be said with certainty that if, in fact, the record failed to show service of an original notice when the

first petition for removal was filed and that therefore the Federal court correctly sent the case back to the state court, the same result would have followed upon a second removal had the state court ordered the case to the Federal court. And for the state court so to do after one remand would clearly have run counter to the ruling made in the Federal court.

So far as the right of the plaintiff to maintain the action, rested upon the attachment proceedings, then the rule applies which was enforced in the case of *Clark vs. Wells*, 203 U. S. 164. In that case it was held that the defendant in the case evidently had notice or warning of the suit and the court, either state or Federal, might legally have condemned any of the funds sequestered in the garnishment proceeding to the payment of the judgment, if one was found against the defendant.

In so far as the right to judgment must rest upon notice or appearance in the state court, the appearance for the purpose of removing the cause into the Federal court was an appearance which met the requirements of the Iowa statute, and for all purposes in the state court, the defendants would thereafter be held to have appeared therein. It is immaterial that this might not be the Federal court construction of such appearance to file a petition for removal because it was conclusively determined by the Federal court that the defendant had no right remove the cause at the time the petition for removal was filed. This determination is not subject to review.

We suppose there is no doubt of the general legal proposition that a plaintiff is not entitled to the remand of a case from the Federal court merely because the transcript fails to show a service of notice. If the defect is that the suit has been instituted in a way which the United States courts will not recognize as sufficient to allow the entry of any judgment, then dismissal is the remedy.

District Judge Chatford in *Lawrence vs. Southern Pacific Company*, 180 Fed. Rep. 832, 851, correctly stated the rule in the following language:

"But, if the defect be only that the suit has been instituted in a way which the United States courts will not recognize as sufficient to allow the entry of judgment, dismissal is the remedy, rather than to exercise jurisdiction in a case in which the court is not satisfied to allow that judgment to be entered in some other forum, with the sanction of the United States court, upon the very point which it has already determined would not justify a judgment in the United States court itself. Such cases as have been cited establish the proposition that if jurisdiction exists over the subject matter of the action, but if there is a defect in jurisdiction over the parties, that question of jurisdiction should be determined as if the action had been begun in the United States Circuit Court in the first instance."

If the court would so refuse to dismiss the case, it being otherwise triable in the Federal Court except for the failure of the plaintiff to serve notice which would warrant the action of the Federal court, then of course the defendants might upon such refusal to dismiss the case, have had the action of the trial court reviewed upon writ of error.

Although the suit must be actually pending in the state court before it can be removed, its removal into the circuit court of the United States does not admit * that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein, but enables the defendant to avail himself, in the circuit court of the United States, of any and every defense, duly and seasonably reserved and pleaded, to the action, "in the same manner as if it had been originally commenced in said circuit court." 156 U. S. 523, 525 (39: 519, 520.)

Wabash Western Railway vs. Brow, 164 U. S., 271, 277: 41 L. Ed. 433-4.

As the defendant's right of removal into the circuit court of the United States can only be exercised by filing the petition for removal in the state court before or at the time when he is required to plead in that court to the jurisdiction or in abatement, it necessarily follows that, whether the petition for removal and such a plea are filed together at that time in the state court, or the petition for removal is filed before that time in the state court and the plea is seasonably filed in the circuit court of the United States after the removal, the plea to the jurisdiction or in abatement can only be tried and determined in the circuit court of the United States.

Goldey vs. Morning News, 156 U. S. 518; 39 L. Ed. 517.

The plaintiffs in error were not precluded from questioning in the Federal court, any want of service or any want of jurisdiction arising because of defective proceedings in the state court.

18 Enc. Pl. & Pr. 359.

Nothing is clearer than this rule:

"A defendant has the right to remove a case from a state court into a United States circuit court, and require the United States circuit court to decide questions as to the validity of service upon him of the jurisdictional process issued out of the court of original jurisdiction."

Calderhead vs. Downing, 103 Fed. Rep. 27, 30.

In the light of these rules it seems highly improbable that the case was remanded for the reason claimed—especially in view of the record which the plaintiffs in error themselves made.

The order remanding the case, certified to by the Clerk of the Federal court, is merely formal, and we contend is not a very strong circumstance to indicate the grounds upon which the ruling was placed.

Certainly the defendants and their counsel did not proceed thereafter in the manner that might have been expected, if they then entertained their present views as to the grounds upon which the cause had been remanded.

The District Judge before whom the motion to remand was heard and who entered the ruling certainly has entertained a very different idea of the grounds upon which the order was made. The same Judge in the case of *Bruett & Co. vs. F. C. Austin Drainage Excavator Co.*, 174 Fed. 668, 672, referring to the remand of this identical case, stated as has always been supposed by counsel, that it was remanded upon the authority of the earlier decision of his predecessor, Judge Shiras, in the case of *Ralya Market Co. vs. Armour & Co.*, 102 Fed. Rep. 530, and the ground for the ruling was that citizenship could not be predicated of a co-partnership. Every subsequent step in the case warrants the conclusion that plaintiffs in error supposed this to be the reason for remanding the case, rather than any question of defect in the transcript. The motion for substitution furnishes conclusive evidence of this. It is therein asserted *"that the only effect of maintaining this action against these defendants in their partnership name, is to prevent a removal of the action to the said United States Circuit Court."* (R. p. 8.) Obviously, the discovery of this statement in reference to the failure of the transcript to show notice is a recent one. Evidently when the motions for substitution were filed, it was well understood as recited by Judge Reed in a later decision, that the case was remanded on the authority of the decision of Judge Shiras in *Ralya Market Co. vs. Armour & Co.*, 102 Fed. R. 530.

V.

The state court was bound to hold that the appearance to file the first petition for removal, was a general appearance. Upon remand of case, the appearance dated from filing first petition and the second one was filed too late.

It is the present theory of counsel for plaintiffs in error that the case would not have been remanded a second time because there was an appearance in the state court which, under the rule of practice prescribed by the Iowa statute, dispensed with the service of notice. Several difficulties present themselves in opposition to this theory. Under the state statute, as applied in the state court, the appearance occurred when the petition for removal was filed.

Section 3541 of the Iowa Code provides: "The mode of appearance may be: * * * ;

3. By an appearance, even though specially made, by himself or his attorney, for any purpose connected with the cause, or for any purpose connected with the service or insufficiency of the notice; and an appearance, special or other, to object to the substance or service of the notice, shall render any further notice unnecessary, but may entitle the defendant to a continuance, if it shall appear to the court that he has not had the full timely notice required of the substantial cause of action stated in the petition."

The state legislature of Iowa had the right to provide that "an appearance even though specially made * * * *for any purpose connected with the cause* * * * shall render any further notice unnecessary", in so far as the procedure in the state court alone is sought to be controlled thereby. *York vs. Texas,* 137 U. S. 15, 34 L. Ed. 604.

We are not in this case concerned with the application of this rule to a case in the Federal Court, and hence the ruling in the case of *Mexican Central Railway Co. vs. Pinkney,* 149 U. S. 194, and similar cases, does not apply.

The Iowa courts in many decisions have determined the scope and effect of this statute and in a variety of cases it has been held that a party, whether served with notice or not, who has invoked any action of the court or taken any steps connected with the cause, cannot thereafter raise any question in respect to the service of process.

In the case of *Lesure Lumber Co. vs. Mutual Fire Ins. Co.*, 101 Iowa, 514, 519, it was determined that the special appearance of an insurance company, admittedly not otherwise suable in Iowa, to object to the service of notice, was a general appearance and rendered any other notice unnecessary. This has been affirmed in many Iowa decisions. In *Locke vs. Chicago Chronicle Co.*, 107 Iowa, 390-395, it is said:

"The same conclusion must be reached on another ground. The district court had jurisdiction of the subject matter of the action; and by its appearance to the action, even though for a special purpose, jurisdiction to determine the case upon its merits was conferred upon the court. The recent case of *Lesure Lumber Co. vs. Mutual Fire Ins. Co.*, 101 Iowa, 514, is applicable on that point, and is decisive. See, also, *Moffitt vs. Chronicle Co.*, 107 Iowa, 407."

An appearance by a non-resident partnership to demur to the petition upon the ground of want of jurisdiction, confers jurisdiction of the persons of the defendants.

In *Johnson vs. Tostevin*, 60 Iowa, 46, 47-48, it is held:

"One ground of demurrer was to the effect that the court had no jurisdiction of the defendants, nor of the subject matter of the suit, for the reason that the petition shows that the partnership, and members thereof, are residents of Wisconsin, and that the place of performance of the contract is in Wisconsin, and there is no averment of a breach thereof, at the place of performance. The demurrer was filed in behalf of all of the defendants. This constituted an appear-

ance to the action, and the court thereby acquired jurisdiction of the persons of defendants."

The Iowa court enforces literally the provision of the statute that the filing of any paper which is "connected with the cause" renders the service of an Original Notice wholly unnecessary.

In the most recent expression of the court which we have found upon the question, a writ of replevin had been issued, and the court said:

"Four days subsequent to the filing of the petition, defendant Walmer filed a motion to quash the writ. In so doing he assailed the writ because of the alleged insufficiency of the petition. The sole issue was the right of possession, and the motion directly assailed the plaintiff's claim thereto. Manifestly, then, the appearance was for a 'purpose connected with the cause,' and rendered the service of an original notice on Walmer unnecessary. Section 3541, Code."

Rummelhart vs. Boone, 126 N. W. 338, 339.

The Missouri Supreme Court and the Iowa Supreme Court are alike in holding that the filing of a motion for change of venue is an appearance in the cause.

Julian vs. Kansas City Star, 209 Mo. 35;
Feedler vs. Schroeder, 59 Mo. 364;
Post vs. Brownel & Co., 36 Iowa, 497.

The Missouri court as we show below has held that a petition for removal stands on the same ground as a motion for change of venue.

While it is the law that the filing of a petition for removal is only a special or qualified appearance *according to the rule which prevails in the Federal court*, such holding of the Federal Court cannot be binding upon a state court when called upon to determine the question as a matter of state court pro-

cedure. In such case the state court is bound to enforce the rule of procedure as declared in the state statute. Because the papers so filed were styled a "petition and bond for removal"—*where the suit is in fact not removable*—the action of the state court is by reason of such filing, invoked to transfer the cause to the Federal Court. The fact of such transfer to which the defendant is not entitled, can be no reason for applying the Federal Court rule in the state court. Upon the remand of the cause to the state court, after a conclusive adjudication in the Federal court that the case was not removable thereto, the state court finds from its records that the defendant has "appeared for a purpose connected with the cause." Is it not then bound to proceed as though a general appearance had been entered at the date of the qualified appearance to remove the cause? Surely it cannot be said that the attempt to transfer the suit to a Federal Court was not "connected with" the cause. Nor can it be said that the filing of a petition for removal to accomplish such transfer is any the less an appearance than the filing of any other paper. The only conflict between the rules in the state and the federal court upon the question is whether the filing of a petition for removal is a special appearance or a general appearance. It is held by the federal courts passing upon the question, as one of general law, that it is only a special appearance. But Section 3541 of the Iowa Code has abolished special appearances and every appearance for any purpose is a general appearance.

This court recognizes the filing of a petition for removal as an appearance, though a qualified one.

In *Clark vs. Wells*, 203 U. S. 164, 172, referring to the filing of the petition for removal and its effect in the action, the court said the defendant "thereby to a qualified extent had appeared in it."

When this cause was remanded from the federal court

to the state court, it was found that almost a year previously the defendant had appeared in the cause for a purpose which the Federal Court would pronounce to be a special or qualified one, but which appearance amounted to a general appearance under the state statute. Now, that appearance could not be said to date merely from the remanding of the case from the Federal Court; the state court was bound to regard the appearance as of the date it was actually made, viz: when the papers were filed in the state court in January, 1904.

The decision of the Federal court determined that the case had been pending at all times in the state court. Not being removable to the federal court, the state court had, in fact, continuous jurisdiction of it; its exercise of that jurisdiction, however, was interfered with by reason of the action which the defendant took. The case cannot be distinguished in principle where the attempt is to remove the cause to a federal court, from cases where the attempt is to change the venue from one state court to another.

The Missouri court had this question before it in the case of *State ex rel. Texas Portland Cement Co. vs. Sale*, 232 Mo. 166, 132 S. W. 1119, 1122. It was there held:

"There is yet another reason appearing in the return of the respondent made to this court for granting this writ of mandamus. After the returns were made upon the summons by the sheriff the defendants in that cause appeared in the court presided over by respondent, and filed an application praying for a removal of such cause from the circuit court of the city of St. Louis to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. It is true that in such application among other things it is said: 'The defendants above named, appearing herein by their attorneys, *specially and for the sole and single purpose of presenting this petition for removal*, respectfully show to this honorable court that this

suit is one of a civil nature being founded upon an alleged liability upon a contract, and that the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand ($2,000.00) dollars as appears by the petition herein.' To our mind this is an entry of appearance in the circuit court of the city of St. Louis and required such court to determine the one question as to whether or not the jurisdiction was in the circuit court of the city of St. Louis or in the federal court named in the application. It required the state court to pass upon the sufficiency of the application, to say the least. We can see no difference between a petition for removal from a state to a federal court and an application for a change of venue from one state court to another. The latter we have held to be an entry of appearance, although the jurisdiction of the state court was questioned. *Julian vs. Kansas City Star,* 209 Mo. 35, 107 S. W. 496."

There can be no objection so far as the Federal Courts are concerned to the rule of practice prescribed by the statutes of the state of Iowa which provide in effect that an appearance of any kind, including a special appearance made for any purpose in the cause, shall dispense with the necessity of service of notice or summons. Such statutes are not when applied to the practice in the state courts, vulnerable to any objection based upon the United States constitution. See *York vs. Texas,* 137 U. S. 15, 34 L. Ed. 604. *Mexican Central Rd. Co. vs. Pinkney,* 149 U. S. 194, 37 L. Ed. 699, 703.

We do not question the rule which is sustained by the decisions of this court that the provisions of such statutes are not binding upon the federal courts in causes removed from the state courts to the federal courts. In the last above cited case, this court stated the question as follows:

"In the present case, the precise question is whether the provisions of the Texas statutes which give to a special appearance made to challenge the court's jurisdiction, the force

and effect of a general appearance, so as to confer jurisdiction over the person of a defendant, are binding upon the Federal courts sitting in that state, under the rule of procedure prescribed by the fifth section of the Act of June 1, 1872, as reproduced in Sec. 914 of the Revised Statutes."

And it was held:

"We are of opinion that under the statutes of the United States the jurisdiction of the Federal courts, sitting in Texas, is not to be controlled by the statutes of that state above referred to. Jurisdiction is acquired as against the person by service of process; but as against property within the jurisdiction of the court, personal service is not required."

Upon this point it was held in the case of *Clark vs. Wells,* 203 U. S. 164, 51 L. Ed. 138, 141:

"Nor did the petition for removal in the form used in this case have the effect to submit the person of the defendant to the jurisdiction of the state court, or, upon removal to the Federal court, deprive him of the right to object to the manner of service upon him, (*Goldey vs. Morning News,* 156 U. S. 518, 39 L. Ed. 517, 15 Sup. Ct. Rep. 559), and the exercise of the right of removal did not have the effect of entering the general appearance of the defendant, but a special appearance only for the purposes of removal. (*Wabash Western R. Co. vs. Brow,* 164 U. S. 271-279, 41 L. Ed. 431-434, 17 Sup. Ct. Rep. 126).

But it is the explicit holding of the court in that case that upon the appearance for the purpose of removing the cause to the Federal court, the defendant waived the right to a notice by publication where there were valid attachment proceedings pending in the state court at the time of filing the petition for removal. It was further said by the court in the last cited case:

"The defendant, it is true, had not been personally served with process or submitted his person to the jurisdiction of

either the state or Federal court. But he did not attack the validity of the attachment proceedings, which appear to be regular and in conformity to the law of the state. There was no necessity of publication of notice in the Federal court in order to warn the defendant of the proceeding; he knew of it, and to a qualified extent had appeared in it.

Without further notice to him, the court had jurisdiction to enter a judgment enforceable against the attached property."

From the date petition for removal was filed in January, 1904, there was, even under the rule which prevails in the federal courts, such notice upon the defendant as would authorize the enforcement of a judgment subjecting the attached property to sale for the payment of the debt. Therefore, according to the federal court rule (had such rule marked the limits to which the state court might go), the Iowa court was authorized to proceed in so far as jurisdiction was conferred against the attached property, without the publication or service of any notice.

It cannot therefore be argued that there were no steps which the state court might take, nor can it be claimed that the filing of the petition for removal was not, to some extent, an appearance, even according to the federal court rule, and an acknowledgment that the defendant knew of the proceedings.

It must be conceded, therefore, that the plaintiffs' right to proceed was interfered with by the removal to the federal court, subsequently determined by that court not be sustainable.

It must be conceded, even according to the Federal Court rule, that there was an appearance for a "purpose connected with the cause," whether that appearance be said to be general or special. No matter how clearly it may appear to the federal court that such appearance was a special appearance,

by the provisions of the Iowa statute which controls the practice in the state courts, the appearance must be regarded as a general appearance, and as we have suggested above, it must be held to be a general appearance dating from the time of the filing of the petition for removal in January, 1904.

There was, therefore, no necessity for showing in the record in the state court, the fact of service of notice, and the second petition for removal was necessarily filed too late.

The Federal circuit court had once remanded the cause for want of jurisdiction. There was in the meantime no change in the status of the case which conferred upon the defendants in that cause a right to petition for the removal of the cause, which right had not existed at the time of the original filing of the petition. There can be no question but that the failure to serve a summons was not a reason itself for defeating the right of removal. The defendant certainly had a right to remove the cause before the service of a summons or original notice in the state court.

In the case of *Clark vs. Wells*, 203 U. S. 164, there had been no service of summons at the time the defendant filed a petition for removal in the state court. The filing of the petition for removal in this case, January, 1904, was in case as determined by the Federal court not to be in fact removable. This constituted so far as the state rules of practice are concerned, a full appearance in the state court and dispenses with the necessity of service of notice. It never became material, therefore, to show the service of notice in the state court even if one was served.

VI.

We wish to discuss the assignments of error and to call attention to the claims therein made in order to point out that the decision from which the writ is prosecuted does not hold what is claimed in several of these assignments.

1.

The first assignment charges that the Supreme Court of Iowa erred in holding that actions may be brought against a partnership so that in a suit by a citizen of Iowa against a partnership not a citizen, the case cannot be removed to the United States court. The Iowa court did not so decide. It decided that the plaintiffs had a right to sue the partnership alone under the state statute and that the lower court properly denied a motion to substitute the individual members of the firm for the partnership. The decision holds no more than that; it does not even consider or suggest the fact that a second petition for removal was filed by individuals not parties to the record, at the same time they filed an application to be substituted as parties and invoked the action of the state court to decide whether or not they were entiled to be substituted for the co-partnership.

2.

The second assignment charges that the Supreme Court of Iowa erred in not holding that Code section 3468 is limited and controlled by the constitution of the United States. No such question was considered by the Iowa court.

3.

The third assignment of error is sub-divided into three paragraphs. Each of these paragraphs assumes that the Iowa court passed upon and considered various orders made by the District Court of Pocahontas County which are not shown to have ever been presented to the Iowa Supreme court for consideration.

This assignment assumes that the Supreme Court of Iowa considered and passed upon each of the propositions presented

for the consideration of the District Court of Pocahontas County, Iowa. The opinion of the state court shows this to be incorrect and shows that such matters were not considered or passed upon. There is no showing that the plaintiffs in error ever properly presented to the Supreme Court of Iowa for its consideration, any question arising out of the failure to send the case a second time to the United States Circuit court. The plaintiffs in error seemed to be satisfied with the opinion of the Supreme Court of Iowa which determined that the only question presented had relation to the order denying substitution. As stated by the Court "but one new question is here presented." After defining the facts out of which this question arises, the court then says: "The defendants now appeal from the order denying substitution.

There was no right of substitution. * * * * *".

Plaintiffs in error do not appear to complain that the Iowa court failed to pass upon any question presented for consideration, and are not in position to claim that court did consider or pass upon any of the matters save the one question outlined in the decision.

4.

The Fourth assignment of error, subdivided into two paragraphs, claims that there was error in denying the motion of John R. McLaughlin and James B. McLaughlin for substitution. It is our contention that this question presents no matter of federal cognizance. No federal question can possibly be involved in this question of practice; it is such a matter of practice as the state court is alone entitled to review.

Statutes which deal with a rule of procedure like statutes which deal with rules of evidence, do not affect substantial rights and their construction cannot be said to involve a federal question.

5.

The Fifth assignment of error charges that there was error because the application of McLaughlin Bros. for substitution was not granted, and is a repetition of the Fourth assignment, save that in the fourth, error is charged in overruling the application of the individual members of the firm. We again call attention to the fact that the plaintiffs in error are of record even in this court as contending that *after the second petition for removal was filed, it was the duty of the state court to still consider and decide these motions and applications.* In other words, it is still admitted that the state court was not deprived of jurisdiction by the filing of a second petition for removal. So long as this is conceded, we do not see how any error can be predicated upon the action of the state court based upon the failure to sustain such petition for removal.

6.

The Sixth assignment of error charges that the Supreme Court of Iowa erred in affirming the order of the District Court of Pocahontas County, Iowa, overruling the petition to remove the cause to the United States Circuit Court; and it is further charged that there was error in overruling this "as to the said McLaughlin Bros." As a matter of fact, McLaughlin Bros. did not sign this petition, nor did it purport to be filed in the name of McLaughlin Bros. (R. pp. 9-10.)

The petition filed for the individuals, John R. McLaughlin and James B. McLaughlin, was of course, contingent upon action by the state court in sustaining the motion for substitution filed at the same time. Clearly, if the petition for removal was effective from the time it was filed, the state court would have no jurisdiction to proceed to consider and de-

cide the motion for substitution. But the plaintiffs in error pressed their motions for substitution for consideration and demanded action from the state court thereon. Nor have they ever claimed until this writ was presented to this court, that the petition for removal should have been sustained unless the motions for substitution were granted.

The right to substitute other parties to the record, than those made parties by the plaintiff, is a question which must be decided according to the practice in the state courts, and does not, at least in this case, involve any federal question.

7.

The assignment of the errors alleged to have been made by the highest state court is no part of the record, and is unavailable for the purpose of showing the decision of a Federal question, where the record itself does not show that any such question was passed upon by such court. *Fowler vs. Lamson*, 164 U. S. 252, 17 Sup. Ct. Rep. 112, 41; 424; *Missouri P. R. Co. vs. Fitzgerald*, 160 U. S. 556, 16 Sup. Ct. Rep. 389, 40; 536. *Medberry vs. Ohio*, 24 How. 413, 16; 739.

An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised and passed on in the court below. *Missouri P. R. Co. vs. Fitzgerald*, 160 U. S. 556, 16 Sup. Ct. Rep. 389, 40; 536. Cited in *Fowler vs. Lamson*, 164 U. S. 255, 41 L. Ed. 425, 17 Sup. Ct. Rep. 112. *Chicago, I. & L. R. Co. vs. McGuire*, 196 U. S. 132, 49 L. Ed. 417, 25 Sup. Ct. Rep. 200.

In *Waters-Pierce Oil Co. vs. Texas*, 212 U. S. 112, 53 L. Ed. 431, 434, the Supreme Court said:

"It is well settled in this court that where a state court decides a case upon an independent ground not within the Federal objections taken, and that ground is sufficient to

maintain the judgment, this court will not review the case. *Leathe vs. Thomas*, 207 U. S. 93, 52, L. Ed. 118, 28 Sup. Ct. Rep. 30; *Eustis vs. Boiles*, 150 U. S. 361, 37 L. Ed. 1111, 14 Sup. Ct. Rep. 31; *Giles vs. Teasley*, 193 U. S. 146, 48 L. Ed. 655, 24 Sup. Ct. Rep. 359."

In *First National Bank vs. Estherville*, 215 U. S. 341, 54 L. Ed. 223, 227, the Supreme Court said:

"In order to give this court jurisdiction of a writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively *that a Federal question was presented* for decision, that its decision *was necessary to the determination of the cause*, and that *it was actually decided*, or that the judgment rendered could *not have been given without deciding it.*"

In *Cincinnati etc. Railroad Co. vs. Slade*, 216 U. S. 78 54 L. Ed. 390, 392, the Supreme Court said:

"But as we have previously shown, on the face of the record it is apparent that the court of appeals did not pass upon the question whether the levy of the attachment was regular, or whether the property seized was subject to levy. It held, construing the statutes of Georgia relating to attachments and the decisions of the highest court of the state, that it was unnecessary to decide these questions, because they had been waived by the conduct of the railway company in giving a replevy bond and answering, etc. without protestation. It follows that no Federal question is presented as to the issue concerning jurisdiction, since the ruling below was based exclusively upon a non-Federal ground broad enough to sustain it without considering or referring to the alleged Federal question. It is besides to be observed that the plaintiff in error in argument does not question the correctness of deductions drawn by the court below from the prior decisions of the supreme court of the state of Georgia. Indeed, there is nothing in the record showing that any question was raised

below as to the repugnancy of the Constitution of the United States of the statute of Georgia concerning the giving of a bond to release attached property, as construed by the supreme court of Georgia. See in this connection, the cases of *York vs. Texas*, 137 U. S. 15, 20, 34 L. Ed. 604, 605, 11 Sup. Ct. Rep. 9; *Kauffman vs. Wootters*, 138 U. S. 285, 34 L. Ed. 962, 11 Sup. Ct. Rep. 298; and *Mexican C. R. Co. vs. Pinkney*, 149 U. S. 194, 205, 37 L. Ed. 699, 703, 13 Sup. Ct. Rep. 859."

The assignments directed to the proposition that the state court committed error in ruling that the plaintiff may sue a co-partnership and that the individual members are not entitled to be joined as defendants in the cause, present no Federal question. This is purely a matter of state practice and procedure and it is not in any way in contravention of any rights which parties are entitled to have considered on a writ to the state court.

The state statute recognizing the legal entity of partnerships for purposes of suit, is a very common one. In this case the judgment of the state court is fully sustained by its ruling in reference to the right of the plaintiff to sue the co-partnership as a distinct legal entity. This decision does not involve any federal question. There can be no necessity for bringing in the several individuals composing a co-partnership so far as the right to prosecute the suit to judgment is concerned. If the individual members of the co-partnership would have a right of removal in the event they had been joined, they have an equal right to remove the cause so far as that feature is concerned by merely having the record show they are the sole members of the co-partnership.

We think this point is conclusively ruled by the decision of this court in the case of *Thomas vs. Board of Trustees*, 195 U. S. 207, 49 L. Ed. 160, 167. In that case the action was brought against the Board of Trustees of the Ohio State

University and it was contended that the suit if it was maintainable, could only be brought by bringing in the persons constituting the Board before the court as defendants; but this court said:

"To the second question our answer is that as the board was entitled to sue and be sued by their collective name, and would be bound by any judgment rendered against it in that name, the jurisdiction of the circuit court would have sufficiently appeared, so far as as the pleadings were concerned, without bringing the several persons constituting the board before the court as defendants, provided the bill had contained the additional allegation that each individual trustee was a citizen of Ohio."

The question of joinder or substitution, therefore, cannot be said to involve any federal question.

VII.

The petition for removal which was filed by John R. McLaughlin and James B. McLaughlin, averred "that the plaintiffs herein and each of them at the time of the commencement of this action were and ever since have been and are now residents, citizens and inhabitants of the state of Iowa." (Record, p. 10.)

The state of Iowa, then, as now, contains two Federal judicial districts. There was no allegation in the petition for removal that the plaintiffs or any single one of them was a resident or domiciled in the northern district of the state of Iowa, in which the suit was brought. We contend that in this respect the petition for removal itself was fatally defective and failed to state a fact essential to the jurisdiction of the Federal court. *Ex parte Wisner*, 203 U. S. 449, 51 L. Ed. 264.

While this case has been the subject of a good deal of controversy in the Federal Court, we understand that it must

be taken as determining that the fact that a plaintiff brings suit in a state court embraced within the territorial limits of a Federal judicial district, is not a consent that the cause may be tried in the Federal court of such district. No doubt this ruling has reference to the venue of the action. When the right of removal is challenged; whenever the plaintiff asserts a timely objection to the removal to the Federal court, there is no right to removal without a showing that plaintiff or defendant is a resident of the district. See *Turk vs. I. C. Rd. Co.*, 193 Fed. Rep. 252, 254; *Jackson vs. Hooper*, 188 Fed. Rep. 509.

District Judge Newman, reviewing the decisions places the following construction upon them:

"So it seems clear, taking these decisions all together, that when a suit is brought in a district of which neither the plaintiff nor the defendant are residents, it will be remanded if a motion is seasonably made for that purpose, but if the plaintiff consents to the suit proceeding in the particular dictrict, by appearance and pleading, the case will be retained in the Circuit Court. So the only question for consideration is whether the fact that the suit was brought by an attachment on land in his district is sufficient to give the court jurisdiction."

(*George vs. Tennessee Coal, Iron & R. Co.*, 184 Fed. Rep. 951, 152-3.)

As every fact which is essential to show that the Federal court has jurisdiction must appear in the petition for removal (the presumption being that the Federal Circuit Court does not have jurisdiction), and as the petition in question failed to show a fact essential to the right of removal, it seems clear to us that upon this ground alone the state court was correct in denying the right of removal, even if such a question is now presented by the record. This point was at least im-

pliedly recognized by Sanford, District Judge, in the case of *Gruetter vs. Cumberland Telephone & Telegraph Co.,* 181 Fed. Rep. 248, 255-6, where the court said:

"I am of opinion, however, that the fact that the plaintiff was a resident of the Middle District of Tennessee at the time the petition for removal was filed affirmatively appears from the declaration which he filed in the state court on the same day, December 17, 1908, in which he is described as 'a citizen of Franklin county, Tenn.', a phrase which, in my opinion, giving to the words their natural and obvious meaning, sufficiently describes the plaintiff as a citizen of Tennessee and a resident of Franklin county. To describe a person as being of a certain county can only mean, as words are ordinarily used, that he is a resident of that county. See *Grand Trunk Ry. vs. Twitchel* (1st Circuit) 59 Fed. 727, 8 C. C. A. 237, in which this is apparently implied. While it is true that the facts necessary to give the federal court jurisdiction must affirmatively appear, no precise and technical form of words is required, and it is sufficient if the necessary facts appear in the record, although stated inartifically and not in technical language. See I. Street's Fed. Pract. Sec. 331, p. 192."

Of couse it appears in that case that the record itself showed such domicile and citizenship as met the objection, but such is not the case here.

One whose petition fails to show a fact essential to Federal court jurisdiction, is not entitled to complain because his case was not removed. Timely objection was made by plaintiffs and the right of removal cannot rest upon the theory that plaintiffs waived objection to the venue.

We respectfully submit that the writ of error should be dismissed, and if not dismissed that the judgment of the Supreme Court of Iowa should be affirmed.

William S. Kenyon,
Denis M. Kelleher,
Maurice O'Connor,
For Defendants in error.